TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 450.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL E. GREENE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MAY 10, 1909.

(21,662.)

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a THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama.

6 Div., 692.

SOUTHERN RAILWAY COMPANY
vs.
SAMUEL E. GREENE.

Appeal from the City Court of Birmingham.

Record and proceedings of said Supreme Court, together with a copy of the opinion of said Supreme Court in above stated cause, together with writ of error, assignments of error, citation and proof of service and copy of writ of error bond.

1 6 Div., 692.

SOUTHERN RAILWAY COMPANY, Appellant,
vs.
SAMUEL E. GREENE, Appellee.

Appeal from City Court of Birmingham.

Organization

THE STATE OF ALABAMA,
Jefferson County:

Be it remembered that at a term of the City Court of Birmingham, begun and held for the county of Jefferson and State of Alabama, in the City of Birmingham, on the First Monday in October, in the year of our Lord Nineteen Hundred and seven and of the Independence of the United States of America, the 132nd year; present and presiding the Honorable Chas. A. Senn, Chas. W. Ferguson, H. A. Sharpe and C. C. Nesmith, Judges of said Court; also present, John S. Gillespy, Clerk and Register of said Court and E. L. Higdon, Sheriff of said County, the following proceedings were had and done, towit:

Complaint.

In the City Court of Birmingham.

SOUTHERN RAILWAY COMPANY, a Corporation under the Laws of the State of Virginia, Plaintiff,
vs.
SAMUEL E. GREENE, Defendant.

The plaintiff, the Southern Railway Company, a corporation duly created by and organized under the laws of the State of Virginia,

claims of the defendant Samuel E. Greene, the sum of Twenty-two thousand four hundred and fifty-eight dollars and thirty-six cents ($22,458.36) for money on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon, is still unpaid, and is the property of the plaintiff. Said money was so received by the defendant as Judge of the Probate Court of Jefferson County from the
2 plaintiff, the Southern Railway Company as a franchise tax, which the defendant demanded of the plaintiff under the provisions of an act of the Legislature of Alabama approved March 7th, 1907, entitled "An act to provide for the revenue of this State by requiring of foreign corporations authorized to do business in this State under the laws of Alabama to pay an annual franchise tax." And the plaintiff avers that the said act is as to it unconstitutional and void, in that said act is an impairment of the obligation of a contract heretofore and hereinafter explained, entered into between the plaintiff and the State of Alabama, and violative of the Constitution of the State of Alabama and of the Constitution of the United States in that regard, and especially of Section 22 of Article 1 of the Constitution of the State of Alabama of 1901, and especially of Section 10 of Article 1 of the Constitution of the United States, and further invalid, unconstitutional and void, in that it deprives the plaintiff of its property without due process of law, and denies to the plaintiff, a person within the jurisdiction of the State of Alabama, the equal protection of the laws, contrary to the terms and effect of the Fourteenth Amendment to the Constitution of the United States, the benefit and protection of all which provisions of the Constitution of Alabama and the Constitution of the United States, namely, Section 22 of Article 1 of the Constitution of Alabama, and Section 10 of Article 1 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, the plaintiff especially claims and relies upon.

Plaintiff states that it is a corporation duly created by and organized under the laws of the State of Virginia, and especially under an act of the General Assembly of Virginia approved February 20, 1894, entitled "An act authorizing the purchasers of the Richmond & Danville Railroad, their assigns and successors to become and be a corporation and to adopt a name therefor, and to possess and exercise general powers, and authorizing the leasing to or by
3 and the consolidation therewith of other corporations. Among other provisions of the said Act was one which granted power to the plaintiff from time to time to lease, use, operate, consolidate with or purchase or otherwise acquire any railroad or transportation company then or thereafter incorporated by the laws of the United States or any of the States thereof. Plaintiff states that it was duly organized under the said act and acquired lines of railroad in Virginia, North Carolina, Tennessee, Georgia and other States. It began business July 1, 1894, and has ever since continued to carry on the same, such business being the acquiring, owning and operating of lines of railroad in various States, and conducting an interstate and intrastate transportation of persons and property. It

files herewith as part hereof a duly certified copy of its charter as Exhibit "A."

On July 16th, 1894 in pursuance of and in conformity with the laws of the State of Alabama, it filed in the office of the Secretary of State of said State of Alabama, a copy of its charter, and at the same time designated its principal place of business in said State, and an agent upon whom process could be served, and at the same time paid to the Treasurer of the State of Alabama, the sum of two hundred and fifty ($250.00) Dollars, being in full payment of the fee required by the provisions of an Act to require all corporations to pay a fee or license for the use of the State before commencing business in this State, approved February 18, 1893. It files herewith as part hereof the receipt of the State Treasurer for said $250.00 and a certificate showing the filing of a copy of its charter and an instrument in writing designating J. M. Bridges, Selma, Alabama, as the agent of the plaintiff in this State, same being marked "Exhibit "B."

Plaintiff states that as soon as it had complied as aforesaid with the laws of Alabama, it at once began carrying on in that state the business for which it was chartered, viz: acquiring, owning and operating railroads both for interstate and intrastate transportation of persons and property; and plaintiff states that it has ever since
4 continued to and does now carry on such business in Alabama.

Plaintiff states that between the time it thus complied with the laws of the State of Alabama and the year 1899 it purchased and acquired as permitted and authorized by the laws of Alabama and there were conveyed to it various lines of railroad (and the franchises under which they had been built and operated) connected with and continuous of other lines owned by plaintiff. These lines of railroad so far as they were and are situate in the State of Alabama, had been theretofore constructed under its laws, by divers corporations either specially chartered by the Legislature of Alabama or organized under its general laws for the incorporation of railroad companies. The plaintiff states that to set forth the franchises of each of these companies would result in making this complaint greatly prolix. Plaintiff states that each of the said Alabama corporations had such powers as are described in the laws of Alabama in force in 1886 for the incorporation of railroad companies, as set forth in the laws of Alabama of 1886 and in the laws amendatory thereof.

These lines of railroad in Alabama so purchased and conveyed to the plaintiff are described as follows, viz:

A line of railroad called Akron Branch running from Akron in Dallas County, through the counties of Dallas, Perry and Hale.

The Blocton Branch, extending from Wilton in Bibb County, through Jefferson and Shelby Counties to Mobile Junction, and from Gurnee Junction to Blocton, through Shelby, Bibb and Jefferson Counties.

The Georgia Pacific extending from the East Alabama State line, near Muscadine, to the Western line of Alabama, near Fernbank, through the counties of Cleburne, Calhoun, Talladega, St. Clair

Jefferson, Walker, Fayette, Lamar, Marion, Tuscaloosa, Pickens and Winston.

The Memphis Division extending from a point near Stevenson, Jackson County, westerly to the Mississippi, Alabama line in Colbert County, through the counties of Jackson, Madison, Limestone, Morgan, Lawrence and Colbert, and a branch running from Tus-
5 cumbia to Florence.

The Florence Division, extending from Tuscumbia to Florence, through the counties of Colbert and Lauderdale.

The Meridian sub-division, extending from Selma to York through the counties of Dallas, Perry, Hale, Marengo and Sumter;

The Mobile Junction cut off, from Valley Creek Branch to North Birmingham, all in Jefferson County.

The Rome & Decatur from the Alabama-Georgia line to Attalla, through the counties of Cherokee and Etowah;

The Selma sub-division extending from the Georgia-Alabama line, through to Selma, Alabama via Anniston, through Cherokee, Colbert, Talladega, Shelby, Bibb, Chilton, Autauga and Dallas.

Plaintiff states that it has continued to own and now owns the properties above described, and has continued to operate and does operate the same for the purposes above described.

Plaintiff states that it acquired said lines, paying large sums of money therefor, and acquiring the same in pursuance of, and in reliance upon the laws of the State of Alabama, and its right so to do, as conferred by said laws and the compliance by the plaintiff with the requirements thereof; that it has since such acquisition continuously operated the said lines of railroad, transacting a large amount of business thereon both interstate and intrastate. And plaintiff states that since it acquired said lines, both before and since the year 1899, it has annually expended large sums of money in the maintenance of said lines and in improvements and betterments thereon and connected therewith.

Plaintiff states that from time to time since such ownership there have been assessed against the plaintiff on account of the ownership of such railroads, ad valorem taxes similar to those assessed against other persons and corporations owning similar property, for the benefit of the State and counties and other local jurisdictions of the State of Alabama, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and of
6 other persons and corporations operating railroads in this State under Section 3489 of the Code of Alabama of 1896, and of Section 1128 of the Code of Alabama of 1886. It has also paid on account of its ownership of such railroads the taxes assessed against it under an Act approved March 7, 1907, known as House Bill 741 and entitled "An Act to make subject to taxation and to tax the franchises or intangible property and estates of every person, association, company and corporation engaged as a common carrier in this state in the business of transporting persons or property over any railroad * * * and to provide for the valuation and manner of ascertaining the values of such franchises or intangible properties, and the distribution of same for local taxation, and the

levy, assessment and collection of said taxes thereon." It has also paid the license fee and procured the license provided for in An Act of the Legislature of Alabama approved March 4th, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations, or corporations organized under or by authority of the law of any other State or government than the State of Alabama, and to fix a punishment for the violation thereof."

All these exactions have been made by the State of Alabama upon corporations owning and operating railroads in Alabama without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized under the laws of some other state, with the sole exception of the license fee last above mentioned, and which is a nominal amount (ten dollars per annum) and is exacted of foreign corporations only, as plaintiff is advised, for mere police purposes and in order that there may be a registration of such foreign corporation doing business in Alabama, in the office of the Secretary of State. To the contrary, however, the Act of the Legislature of which plaintiff is now complaining (being the act approved March 7, 1907) and under which the plaintiff was compelled to pay the said sum of $22,458.36 does not apply to persons or corporations of the State of Alabama owning the same
7 character of property and carrying on the same kind of business as is owned and carried on by corporations organized under the laws of another State, nor is there any similar exaction against domestic corporations owning such character of property and engaged in such character of business.

The said railroad lines in Alabama acquired and operated by the plaintiff as hereinabove set forth were made the basis for computing the amount of capital employed by the plaintiff in Alabama, and for ascertaining the tax which is the subject of this suit.

Plaintiff avers that under and by virtue of its compliance with the laws of the State of Alabama as hereinbefore set out and the purchase made by it as duly authorized by the laws of said State of Alabama, it obtained the right to use such property for both interstate and intrastate business as a common carrier railroad in the State of Alabama, that the obligation of said several contracts would be impaired if the Act of the Legislature of Alabama herein complained of should be held valid or enforcible, in that it would impose upon the plaintiff as a condition to its further doing business in the State of Alabama and the use of its property in the only way in which it can be profitably employed, a condition which, under the facts as stated above, cannot be imposed by the State of Alabama without a violation of the plaintiff's rights, acquired as herembefore stated. The plaintiff further says that the said Act of the Legislature of Alabama complained of deprives the plaintiff of its property without due process of law, and denies to the plaintiff the equal protection of the laws in that the plaintiff has under the terms of the laws of the State of Alabama, come to be and is, in the sense of the first section of the Fourteenth Amendment to the Constitution of the United States, a person within the jurisdiction of the State of Ala-

bama, and the exaction complained of is made against it and not against persons or domestic corporations owning the same character of property and conducting the same kind of business, and is therefore a denial to the plaintiff by the State of Alabama of the
8 equal protection of the laws.

By the said Act complained of it is provided that upon failure to pay the exaction therein demanded the corporation so failing is prohibited from doing any business in the State of Alabama not constituting interstate commerce, and is prohibited from maintaining or conducting any action in any of the Courts of Alabama upon a contract made in Alabama, other than contracts based upon interstate commerce. The enforcement of such a provision as this would prevent the plaintiff from using its property in intrastate commerce and would deprive such property of a large and substantial part of its value, and would substantially impair the value of the use of plaintiff's property in the State of Alabama.

Plaintiff states that its principal place of business in Alabama is in Birmingham, Jefferson County, and there resides the agent upon whom plaintiff, according to the terms of the law of Alabama has designated as the person upon whom process against it may be served.

The defendant is the Probate Judge of said Jefferson County, and it was demanded of the plaintiff, under said Act approved March 7, 1907 that it should make a return under the same. The plaintiff made such return, protesting at the same time that the said Act was invalid. A copy of its return as made is filed herewith as a part hereof, marked "Exhibit "C."

The said Probate Judge upon consideration of the said return made a finding that the actual amount of the capital of the plaintiff employed in the State of Alabama in the year 1907, was $14,903,246 basing the same upon the value of the railroads above described, as assessed for ad valorem taxes for the current year; and a finding upon this computation that the tax due as provided in the Act (two-thirds of which belonged to the State and one-third to the County) was twenty-two thousand four hundred and fifty-eight dollars and thirty-six cents ($22,458.36) and said Probate Judge thereupon demanded of the plaintiff forthwith payment of such sum, with the consequences following a delinquency denounced by the
9 provisions of said Act. And plaintiff avers that under duress, because of the provisions of said law prohibiting the plaintiff from doing any business in the State of Alabama not constituting interstate commerce or to maintain and demand any action in any of the Courts of this State upon a contract made in this State, other than contracts based on interstate commerce, unless it should have paid said tax within sixty days from January 1, 1908 and because of other penalties with which it was threatened for a failure to pay said taxes, it paid to the said defendant on February 29, 1908, the sum of twenty-two thousand four hundred and fifty-eight dollars and thirty-six cents ($22,458.36) accompanying said payment with a written protest against its exaction, and with a notice to the defendant not to pay over said money or any part thereof to the authorities

of the State of Alabama or the County of Jefferson; and with a notice that the plaintiff proposed, within thirty days from that date to bring suit against the defendant for the recovery of said money. The said defendant acknowledged payment of the said sum and acknowledged same to have been paid by it under protest and under duress, and acknowledged the receipt of the notice warning him against paying over said money unless the plaintiff should fail for thirty days from the date thereof to bring suit to recover the same. Such protest and notice and such receipt of the defendant, are filed herewith as part hereof, marked "Exhibit D." And the said defendant now retains said sum and will retain the same until and subject to the final determination of this action and in compliance with said notice.

Plaintiff states that ever since the filing of its statement with the Secretary of State on July 16, 1894, as hereinbefore set forth, the plaintiff has been a person subject to the jurisdiction of the State of Alabama, in the sense of Section 1 of the Fourteenth Amendment to the Constitution of the United States; that the said State of Alabama has exercised jurisdiction over the plaintiff continuously ever since that date in respect to all of its property situate within the State of Alabama; that it has subjected it to the same laws to which persons and domestic corporations carrying on similar business have been subjected; that under the laws of the State of Alabama there has been created the Railroad Commission of the State of Alabama, with large authority over persons and corporations owning and operating railroads in Alabama, and that said Railroad Commission has, at divers times and continuously since the said 16th of July, 1894, exercised control over this plaintiff in divers ways and to exactly the same extent as it exercised such control over other persons or corporations conducting a similar business.

10

Count No. 2

The plaintiff claims of the defendant the further sum of $7,186.12, being one-third of the said amount of $22,458.56, sued for in the first count of this complaint, which said sum of $7,186.12 was collected for the use of the County of Jefferson, Alabama, by the defendant under said Act as fully set forth in the first count of the complaint. And plaintiff avers that the said tax was illegally exacted of the plaintiff by the defendant in that the said act violates Section 45 of Article 4 of the Constitution of the State of Alabama of 1901, declaring that "each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills and bills adopting a code, digest or revision of statutes," and in that the title of said act in terms provides only for the revenue of the state and contains no provision for the revenue of any county of the state; nevertheless said act, in the body thereof, provides that in addition to the amount of franchise tax required to be paid to the state, the corporation shall pay to the county, for the use of such county, an amount equal to one-half of the amount paid by it to the State;

Which said several sums of money with the interest thereon are now due and unpaid.

Wherefore the plaintiff sues.

ALEX P. HUMPHREY &
JAMES WEATHERLY,
Att'ys for Plaintiff.

11 EXHIBIT "A."

STATE OF VIRGINIA:

An act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors to become and be a corporation, to adopt a name therefor and to possess and exercise general powers; and authorizing the leasing to or by and the consolidation therewith of other corporations.

(Approved February 20, 1894.)

Certificate required by Section 3 of the foregoing Act to be filed in the office of the Secretary of the Commonwealth of Virginia, and

Acts of Assembly of the State of Virginia, approved respectively January 23, 1900, and February 26, 1902, relating to Southern Railway Company.

An act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of other corporations.

(Approved February 20, 1894.)

Whereas, a certain suit is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant and the Richmond and Danville Railroad Company, a corporation created by and existing under the laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage dated twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instruments dated November first, eighteen hundred and eighty-

12 six and April Thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges and franchises of the said Richmond and Danville Railroad Company.

And, whereas, it is deemed desirable and for the interest of this Commonwealth that the said railroad property shall be sold and re-

ized in such manner and under such conditions as to secure
rgest and best possible facilities and advantages of transporta-
nd communication for the people of this State; now, there-

Be it enacted by the General Assembly of Virginia, that the
aser of the said mortgaged premises of the said the Richmond
Danville Railroad Company at the foreclosure sale thereof in
ourse of the said suit in equity, and such person or persons as
they may associate with himself or themselves, shall forthwith
d they hereby are, constituted a body politic and corporate by
ame which they may select, as set forth in the conveyance of
nortgaged premises, or in any writing signed by him or them
recorded in the Court in which the said conveyance shall be
led, and such new corporation shall have, possess and be in-
l with all the estate, right, title and interest in and to such rail-
and other property, with their appurtenances, and all the
hises, rights and privileges had and possessed by the said Rich-
and Danville Railroad Company to the same extent as a pur-
r under sections twelve hundred and thirty-three and twelve
red and thirty-four of the Code of Virginia, and shall perform
e duties prescribed by said sections of said Code; provided,
ver, that said new corporation shall not be limited as to the
nt or classification of its stock or bonds, except that the total
nt of stock issued shall not exceed three hundred and fifty
n dollars, and shall have no immunity from any lawful State,
y or municipal taxation by reason of its former charter or any
eretofore exempting from taxation.

Such purchaser or purchasers may associate with him or them
any number of persons in the organization of the new cor-
poration, which may create and issue its stock and its bonds
secured by mortgage or otherwise according to any plans
ed by such purchaser or purchasers and filed as hereinafter
led.

It shall be the duty of such new corporation within six months
the conveyance to it of said mortgaged premises to execute a
cate in writing under its common seal attested by the signature
President or Vice-President, referring to the sale and con-
ce by which it shall have acquired title to such premises and
an of organization adopted by the purchasers, the amount and
s or kinds of capital stock and mortgage bonds or other obliga-
authorized to be issued, and also specifying the name of such
orporation and of its President and the number and names of
rectors, which certificate shall be filed in the office of the Secre-
of the Commonwealth of Virginia, and a certified copy thereof
be conclusive evidence of the existence of such new corpora-

In addition to its other powers, such new corporation shall
and from time to time as occasion arises may exercise, the fol-
g powers, or any of them, namely:

With the approval of a majority of its stockholders, given at
ting, it may from time to time, lease, use, operate, consolidate
or purchase or otherwise acquire or be leased, used, operated by

or consolidated with any railroad or transportation company now or hereafter incorporated by the laws of the United States, or any of the States thereof, or any one or more of such railroad or transportation companies or any other railroad or transportation company or companies which now are or hereafter may be leased or used or operated by or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General As-
14 sembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively given at any meeting, to make and carry out such contracts of consolidation, or lease, sale or other method of acquisition; provided that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease, shall be or remain subject to the jurisdiction of the Courts of this State, and all lines of railroad operated by it in the State of Virginia shall be subject to the general laws of the State; and provided, further, that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds, or either, of any inland, coast or ocean transportation company or companies, operating to or from any point or points on its lines; and it may develop or aid in the development of its business, by acquiring or guaranteeing the stocks and bonds or either of hotel, li-terage, wharf, elevating and other enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and, from time to time, it may increase
15 or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization or with the approval of a majority in amount of the stockholders, given at a meeting of stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote, respectively,

all be determined in the said plan of reorganization, or by the holders in like manner.

Such new corporation may borrow money and issue bonds or r evidence of indebtedness therefor, and may secure the same time to time by mortgage or deed of trust upon any or all of its erty and franchises, and such new corporation from time to time issue and sell its bonds and its capital stock at such prices and on terms as shall be specified in said plan of reorganization, or as a rity in amount of the stockholders shall approve at any meeting, may receive in payment therefor property, securities or shares in corporation mentioned in this act, and any stock so issued shall eemed fully paid and free from any liability.

The business, property and concerns of said corporation shall anaged by a Board of Directors consisting of not less than five nbers and one of their number shall be chosen as President. stockholders may adopt by-laws for the government of the k, property and concerns of the corporation, and for the regula- of its directors, officers and agents, and in and by such by-laws stockholders may prescribe how such by-laws may be amended or aled; provided, however, that until such by-laws shall be adopted the stockholders the corporation shall be governed by by-laws oted in accordance with the plan of organization.

The principal office of the Company shall be in the City of mond, in this State, at which all meetings of the Stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of mond upon the petition of the President and Board of Directors, ny time to order a change in the name of the Company; but any change of name shall be without prejudice to the rights of any litor, or to the exercise of any of the powers and privileges granted his act.

0. There shall be paid to the clerk of the County or Corporation which any mortgage authorized by this act may be presented for rdation, the existing rate of taxation for such recordation upon assessed value of the road-beds, depots, station buildings and lots machine shops, fixtures and rolling stock, and any real estate included in said enumeration in the State of Virginia, conveyed uch mortgage; and upon presentation to the Clerk of the County orporation where it is proposed to record said mortgage of a cer- ate of the Auditor of the State of the amount of the assessed es of the said property within the State of Virginia, and upon payment of the tax thereon to the said Clerk, the said mortgage l be recorded without other charge than the clerical fees provided uch cases. Certified copies of such mortgage may be recorded in county of Virginia in which property covered by such mortgage be located upon payment of clerical fees.

1. All taxes and debts due or to become due the State of Vir- a by the corporation shall be paid in lawful money of the United es, and not in coupons.

12. This act shall be in force from its passage.

A true copy.

Teste:

——— ———,

Clerk of the House of Delegates and Keeper of the Rolls of Virginia.

Date, —— —, ——.

Southern Railway Company.

Certificate.

STATE OF VIRGINIA,

City of Richmond, ss:

17 Southern Railway Company, a corporation organized and existing under and pursuant to the provisions of an Act of Assembly of the State of Virginia, approved February 20, 1894 (of which act a copy marked "Schedule D," is hereunto annexed and made a part of this certificate), entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by and the consolidation therewith of other corporations," in conformity to the requirements of Section 3 of the said act does hereby certify as follows, viz.:

First. The said Southern Railway Company upon June 18, 1894, did acquire title to the rights, property, privileges and franchises of the Richmond and Danville Railroad Company embraced in and covered by its consolidated mortgage to the Central Trust Company of New York dated October 22, 1886, under and by means of the following sale and conveyance, viz.:

(1) The sale of the said mortgaged premises was held in the City of Richmond, on the 13th day of June, 1894, under a decree of foreclosure and sale entered on the 13th day of April, 1894, in a certain suit in equity pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company and others were complainants and the Richmond and Danville Railroad Company was defendant, in which suit it was sought to foreclose the said consolidated mortgage, and also to sell the whole of the mortgaged property and premises, being the rights, property and privileges and franchises of said the Richmond and Danville Railroad Company, at which sale the mortgaged premises were bid in by and struck off to Charles H. Coster and Anthony J. Thomas a purchasing committee, as purchasers thereof, with the intent and for the purpose of vesting the same in the said Southern Railroad Company thereafter to be organized by the said purchasers and their associates, pursuant to the laws of the State of Virginia.

(2) The conveyance of the said mortgaged premises was
18 made, pursuant to the order of the Circuit Court of the United States of America, by the Special Masters in said suit, Matthew F. Pleasants, Thomas S. Atkins and Charles Price, upon

18th day of June, 1894, to the said Charles H. Coster and hony J. Thomas, as Purchasing Committee for the benefit of said Southern Railway Company, such conveyance having been recorded on the said 18th day of June, 1894, in the Chancery rt of the City of Richmond, in the State of Virginia.

econd. The plan of organization adopted by the purchasers is of which a copy is hereunto annexed marked "Schedule B" and le a part of this certificate.

Third. The amount and classes or kinds of capital stock already norized to be issued by the new corporation (subject to increase to but not exceeding the limit prescribed by said act) were and One million two hundred thousand shares of common stock, six hundred thousand shares of preferred stock, each and every shares being of the par value of one hundred dollars each and aggregate par value of such shares being one hundred and eighty ion dollars.

The preferences, conditions and voting power of such capital stock as set forth in the said plan of organization hereunto annexed ked "Schedule B."

ourth. The amount and classes or kinds of mortgage bonds or r obligations heretofore authorized to be issued by said corpora- are bonds secured by mortgage payable as therein specified, and, pt as and when registered as therein provided, being negotiable ruments, passing by delivery, free from any and all defences, nst the holder thereof, such bonds having been authorized to the unt of one hundred and twenty-four million five hundred thou- l dollars, including what are known as its "East Tennessee Re- nization Mortgage Bonds," for the aggregate amount of 00,000 and its "First Consolidated Mortgage Gold Bonds," for the aggregate amount of $120,000,000 of which last men- tioned bonds a large part are not now to be issued, but are reserved for various purposes mentioned in the mortgage se- ing said bonds, dated October 2, 1894, and duly recorded Novem- 9, 1894, in the office of the Clerk of the Chancery Court of the of Richmond, in the State of Virginia, and also in other offices; among other purposes for the redemption and payment in due se of the bonds of the Richmond and Danville Railroad Com- r, secured by its two mortgages to Central Trust Company of New k, as Trustee, dated respectively October 5, 187[illegible] and February 1, 2, such last mentioned mortgage having been [illegible]ended by agree- t dated July 24, 1894, between the said Central Trust Company the said Southern Railway Company, a part of the mortgaged ises first above mentioned having been sold and purchased sub- thereto, and such bonds have been and are assumed by the South- Railway Company; and also for the payment and redemption ne course of the said "East Tennessee Reorganization Mortgage ds," and also for the redemption and payment on July 1, 1909, ch of the first mortgage bonds of the Charlotte, Columbia and usta Railroad Company as shall have been extended in accord- with the provisions of an agreement made July 5, 1894, between Southern Railway Company and the Maryland Trust Company,

the holders of all such extended bonds then outstanding being entitled to exchange the same as par for like amount of the said First Consolidated Mortgage Bonds, interest to be adjusted properly at the time of every such exchange.

"Schedule A" hereunto annexed is a list of the properties now embraced in the Southern Railway System, and is also a statement of bonds and obligations issued or assumed by or chargeable upon property purchased by Southern Railway Company under its said charter, "Schedule D," showing the letter, date of issue, number of bonds, amount of issue, rate of interest, and when and where payable; the only bonds issued directly by Southern Railway Company being those issued under the two mortgages first above mentioned, dated October 2, 1894.

Fifth. The name of the new corporation is "Southern Railway Company" and the name of its President is Samuel Spencer.

Sixth. The Directors of the new corporation are nine in number and their names are:

Aubin L. Boulware, Richmond, Va.
Charles H. Coster, New York, N. Y.
Harris C. Fahnestock, New York, N. Y.
Thomas F. Ryan do.
Samuel Spencer do.
Anthony J. Thomas do.
Samuel Thomas do.
Skipwith Wilmer, Baltimore.
J. Hood Wright, New York.

A vacancy exists because of Mr. Wright's death, November 12, 1894.

In witness whereof, the said Southern Railway Company has executed this certificate under and by its common seal attested by the signature of its President, this fourth day of December, 1894.

[Seal of Southern Railway Company.]

Attest:

SAMUEL SPENCER,
President of the Southern Railway Company.
W. A. C. EWEN, *Secretary.*

STATE OF NEW YORK,
City and County of New York, ss:

I, George H. Corey, a Commissioner of Deeds for the State of New York, thereto duly appointed by the Governor of the State of Virginia, and a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Samuel Spencer, whose name is signed to the foregoing and hereto annexed certificate bearing date the fourth day of December, 1894, as President of the Southern Railway Company, with whom I am personally acquainted and who is personally known to me to be the President of the Southern Railway Company, the corporation described in and which executed the said cer-

tificate, personally appeared before me at my office in my said County and corporation, for himself and on behalf of the Southern Railway Company, and being informed of the contents of the said certificate, he did on this day acknowledge the due execution of the foregoing certificate on the day the same bears date; and further acknowledged that he voluntarily executed, signed and sealed the said certificate as his free act and deed, and as the free act and deed of the said Southern Railway Company for the purposes and uses therein mentioned:

And the said Samuel Spencer, being by me first duly sworn did depose and say: That he resides in the City of New York in the State of New York; that he is the President of the Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing instrument is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said Company, and that he signed his name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia and as Notary Public for the City and County of New York in the State of New York, at my office this fourth day of December, 1894.

GEORGE H. COREY,
Commissioner for the State of Virginia, in New York.

[Seal of George H. Corey, Commissioner for Virginia.]

GEORGE H. COREY,
Notary Public for the City and County of New York, in the State of New York.

[Seal of George H. Corey, Notary Public, New York.]

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New York, and also Clerk of the Supreme Court in said City and County, the same being a Court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the said certificate of acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 12th day of December, 1894.

HENRY D. PURROY, *Clerk.*

[Seal of the Supreme Court, City and County of New York.]

"SCHEDULE A."

(*a*) Lines of which the ownership has been absolutely merged into the Southern Railway Company (or the Companies of like name in Kentucky and Mississippi) by purchase at foreclosure or by other conveyance:

Richmond, York River & Chesapeake	about	39	miles
Richmond & Danville	"	145.53	"
Piedmont	"	48.	"
Washington, Ohio & Western	"	50.12	"
Western North Carolina	"	307.	"
Statesville & Western	"	20.36	"
Northwestern North Carolina	"	100.15	"
Clarksville & North Carolina	"	7.03	"
Oxford & Clarksville	"	49.32	"
Oxford & Henderson	"	12.94	"
Atlantic, Tennessee & Ohio	"	.44	"
Charlotte, Columbia & Augusta	"	190.53	"
Columbia & Greenville	"	164.98	"
Georgia Pacific	"	552.	"
East Tennessee, Virginia & Georgia	"	1254.40	"
Louisville Southern	"	123.88	"
		3,109.24	

(*b*) Operated lines of which all or nearly all the stock is or is expected to be owned by Southern Railway Company:

23	Virginia Midland* and branches (leased)	about	400.70 miles
	High Point, Randleman, Asheboro & Southern (all bonds also owned)*	about	27.81 "
	North Carolina Midland (all bonds also owned)*	"	26.11 "
	Elberton Air Line (All bonds also owned)*	"	50.36 "
	Roswell	"	9.11 "
	Yadkin*	"	41.17 "
	State University (no bonds issued)	"	10.20 "
			565.46 miles

*MEMO.—It is intended later on to bring about a conveyance of these lines to the Southern Railway Company.

(*c*) Leased Lines:

North Carolina Railroad	about	223.20	miles
Atlanta & Charlotte	"	268.54	"
		491.74	miles

(*d*) Lines operated under various arrangements:

awrenceville (all bonds and majority of stock owned but line is of no value and has been discontinued..	9.61	miles
ichmond & Mecklenburg (all second mortgage bonds and most of stock owned)	31.45	"
shville & Spartenburg and Spartenburg, Union & Columbia (operated temporarily for account of first mortgage bond-holders	133.90	"
	174.96	miles
(*e*) Knoxville & Ohio Railroad (nearly all the — owned)	66.00	"
(*f*) Baltimore, Chesapeake & Richmond Steamboat Line (all the stock and all certificates of debt owned)	200.00	"
Total Mileage.....about	4607.40	"

(*g*) Lines operated independently in which Southern Railway Company is interested as Bondholder:

anville & Western.....about	70.	miles	
hester and Lenoir, north end.....	"	33	"
lue Ridge (believed to be of no value).....	"	34.02	"
aurens do.	"	29.90	"
ilton & Sutherlin do.	"	6.50	"
artwell	"	10.10	"
		183.52	miles
Grand Total .....about	4790.92	miles	

4 (Here follows "Schedule A" Continued" which appears on pages 24A and 24B.)

Southern Railway Company.

Outstanding Mortgage and Obligations.

Principal and Interest payable, except as otherwise specified, in the City of New York.

Name of Railroad Company.	Description of Bond or Obligation.	Due.	Int.	Amount.
	A.			
	On Properties merged into Southern Railway Co.			
Richmond & Danville	Consolidated gold 6's	Jan. 1915	J. & J.	$5,997,000.00
do	Debenture 5s (formerly 6s) (earliest coupon April, 1898)	April 1927	A. & O.	3,568,000.00
do	Equipment S. F. gold 5's (1)	Sept. 1909	M. & S.	1,194,000.00
do	Equipment Notes	Various		507,835.00
Richmond, York River & Chesapeake	First Mortgage 5's	Jan. 1910	J. & J.	400,000.00
do do	Second Mortgage 4½'s	Nov. 1910	M. & N.	500,000.00
Washington, Ohio & Western	First Mortgage 4's	Feb. 1924	F. & A.	1,025,000.00
Atlantic, Tennessee & Ohio	First Mortgage 6's	April 1913	A. & O.	150,000.00
Western North Carolina	First Mortgage gold 6's	July 1914	J. & J.	2,531,000.00
Charlotte, Columbia & Augusta	First Mortgage gold 7's due January 1st, 1895, extended at 5% to July 1909	July 1909	J. & J.	2,000,000.00
do do	Second Mortgage 7's earliest coupon Oct. 1895	Oct 1910	A. & O.	500,000.00
Columbia & Greenville	First Mortgage gold 5's to January 1898 6's thereafter	Jan. 1916	J. & J.	2,000,000.00
Georgia Pacific	First Mortgage gold 5's to January 1898, 6's thereafter	Jan. 1922	J. & J.	5,660,000.00
do	Equipment S. F. gold	Various	F. & A.	787,000.00
do	Equipment Notes	Various		359,005.54
East Tennessee, Virginia & Georgia	Divisional Mortgage 7's	July 1900	J. & J.	3,123,000.00
do do	Divisional Mortgage gold 5's	July 1930	J. & J.	3,106,000.00
do do	Consolidated gold 5's	Nov. 1956	M. & N.	12,770,000.00
do do	Equipment Notes (including Louisville Southern)	Various		415,831.59
Alabama Central	First Mortgage gold 6's	July 1918	J. & J.	1,000,000.00
Southern Railway	East Tennessee Reorganization dated October 2, 1894 for old Equipment and Improvement bonds, gold 4's to March 1898 inclusive, 5's thereafter.	Mar. 1938	M. & S.	45,000,000.00

(1) Also payable in London, England.

B.

On properties practically owned (*) or leased to (†)

Southern Railway Company.

*Virginia Midland	Serials [1]	Various	M. & S.	$7,635,000.00
* do	General Mortgage 5's	May 1936	M. & N.	4,859,000.00
*Charlottesville & Rapidan	First Mortgage 6's [2]	July 1913	J. & J.	421,700.00
*Franklin & Pittsylvania	First Mortgage 6's [2]	July 1913	J. & J.	79,000.00
*Atlanta & Charlotte Air Line	Preferred Mortgage 7's	April 1897	A. & O.	500,000.00
* do do	First Mortgage 7's	Jan 1907	J. & J.	4,250,000.00
† do do	Income 6's	April 1900	A. & O.	750,000.00
† do do	Stock 5's		M. & S.	1,700,000.00
† do do	Rental Equivalent to 6% on stock	Sept. 1901	J. & J.	4,000,000.00
*North Carolina	First Mortgage gold 6's	July 1, 1925	J. & J.	2,000,000.00
Knoxville & Ohio				

C.

On all property of the Southern Railway Company, including leaseholds, stock and bonds.

Southern Railway Company	First Consolidated Mortgage gold 5's dated October 2, 1894, total issue $120,000,000 of which	July 1994	J. & J.	
	Reserved to take up foregoing bonds stock &c		78,088,372.13	
	do for new construction and other purposes		20,000,000.00	
	To be issued now		21,911,627.87	21,911,627.87
	Total existing debt Southern Railway Company			100,000,000.00

[1] Interest payable in Baltimore, Md.
[2] Interest payable in Philadelphia, Pa
[3] Interest payable in Baltimore, Md.

SCHEDULE "B."

Southern Railway Company.

The purchasers of the railroad and other property of the Richmond and Danville Railroad Company, at the foreclosure sale thereof held in the City of Richmond on the 15th day of June, 1894—viz: Charles H. Coster and Anthony J. Thomas and their associates, constituting Southern Railway Company, a corporation organized and existing under the laws of the State of Virginia, and particularly an Act of Assembly of said State entitled:

"An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers, and authorizing the leasing to or by, and the consolidation therewith of other corporations" approved February 20, 1894, have adopted and adopt the following as

The Plan of Organization.

First. The said purchasers and the Southern Railway Company have accepted and do accept the before mentioned Act of Assembly of the State of Virginia, and, anything herein contained or herefrom omitted to the contrary notwithstanding, they do reserve and retain the right from time to time and at all times to exercise and enjoy any and every right, power, privilege and franchise conferred in and by said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, or by any other act or law of which the Southern Railway Company may lawfully claim the benefit.

Second. The said purchasers and the Southern Railway Company have fixed the capital stock of the corporation at $180,000,000, divided into one million eight hundred thousand shares of the par value of $100.00 each, of which six hundred thousand shares are preferred stock and the remainder are common stock, reserving the right to increase such capital stock, up to, but not exceeding, the limit authorized by the said Act of Assembly of the Commonwealth of Virginia approved February 20, 1894, and to increase or decrease the amount of any class or kind or grade of its capital stock, and also reserving any and all right to redeem and purchase at par any and all preferred stock of any kind, class or grade thereof.

The preferred Stock is entitled to the following preferences and to no other, viz:

In each and every fiscal year after the first day of July, 1895, to receive non-cumulative dividends at and up to the rate of five per cent. per annum in preference and priority to the payment of any dividend on the common stock in such fiscal year, but only from the net profits of the Company, as such shall be fixed and determined by the Board of Directors, and only when and as such Board shall declare dividends therefrom; but, notwithstanding the preference hereby declared, if, after providing for the payment of dividend-

for any fiscal year on the Preferred Stock outstanding in such year, there shall remain a surplus of net profits of such year, the Board of Directors may declare and pay dividends upon any other stock of the Company for such year out of such surplus net profits.

Such preferred Stock is authorized to the amount of Sixty Million Dollars; and, without the consent of the holders of a majority of such Preferred Stock then outstanding, the Company can neither increase such authorized amount thereof nor put upon its property any mortgage to secure bonds for more than the aggregate principal sum of one hundred and twenty million dollars, in addition to prior liens thereon, assumed, extended or renewed or any substitu-
26 tions therefor, against which like amount of bonds shall be reserved out of such amount of $120,000,000.

The conditions and voting power in respect of and belonging to all such stock are as follows:

With the exception of one thousand shares of Common Stock, heretofore issued or reserved to qualify Directors, or for other purposes, all of the stock of the Company—viz: 1,199,000 shares of common stock and 500,000 shares of preferred stock—have been duly issued and have been duly delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker and their successors, as Voting Trustees, under an agreement dated October 15, 1894, with the exclusive right and privilege, in the said voting Trustees during the continuance of their trust, as stated in said agreement, to vote upon and in respect of all such stock so issued to them, and also to collect and receive any dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock-trust certificates, which holders in due course will be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of this Company then entitling them to one vote for each share thereof, and in the meantime to receive payments equal to the dividends, if any, collected by the Voting Trustees upon such number of such shares outstanding in the name of the Voting Trustees, who, until after the actual delivery of such stock certificates shall possess and shall be entitled to exercise all rights of every name and nature, including the right at each and every corporate meeting or election to cast one vote for and in respect of each and every share of the capital stock of the Southern Railway Company on account of which such stock trust certificates shall be issued, it being expressly stipulated that no voting right passes from the Company or from the Voting Trustees by, under or in respect of any such stock trust certificates or by or under any agreement expressed or implied.

Third. The prices and terms upon which the Southern
27 Railway Company from time to time has issued and sold or shall issue and sell its bonds and its capital stock are those which heretofore have been or from time to time hereafter shall be approved by a majority in amount of the stock holders at their meetings, bonds to the aggregate amount of $121,500,000 having been heretofore authorized for all purposes, including the payment of all prior liens.

Fourth. The by-laws of the Southern Railway Company are those which on the fifth day of July, 1894 were duly adopted by the Board

of Directors of said Company at its first meeting, and upon the same day adopted and ratified by the stockholders at their first meeting, subject to the amendments thereto from time to time adopted and to be adopted as therein provided and the officers and duties of the officers of the Company shall be as provided by such by-laws, a true copy of such By-laws as amended to this date being hereunto annexed, marked "Schedule C" forming part of this plan of organization.

In witness whereof, the said purchasers—Chas. H. Coster and Anthony J. Thomas—have hereunto subscribed their names and the Southern Railway Company has caused its common seal to be hereunto affixed and to — attested by the signature of its president this fourth day of December, 1894.

C. H. COSTER.
ANTHONY J. THOMAS.
SOUTHERN RAILWAY COMPANY.
By SAMUEL SPENCER, *President*.

[Seal of Southern Railway Company.]

STATE OF NEW YORK,
City and County of New York, ss:

I, George H. Corey a Commissioner of Deeds for the State of New York thereto duly appointed by the Governor of the State of Virginia, and being also a Notary Public for the said City and County of New York, thereto duly appointed by the Governor of the State of New York, do hereby certify that Charles H. Coster and Anthony J. Thomas whose names are signed to the Writing hereto annexed, bearing date on the fourth day of December, 1894 have
28 severally acknowledged the same before me in my State and corporation aforesaid.

And I do further certify that in my said State and corporation on this fourth day of December, 1894 before me personally appeared Samuel Spencer, whose name is signed to the foregoing and hereto annexed Plan of Organization, bearing date the fourth day of December, 1894 as President of the Southern Railway Company, the corporation described in and which executed the said plan, and for himself and in behalf of the said Southern Railway Company being informed of the contents of the said plan, did on this day acknowledge the due execution of the plan on the day the same bears date; and further acknowledged that he voluntarily executed, signed, sealed and delivered the said plan as his free act and deed, and as the free act and deed of the said Southern Railway Company, for the uses and purposes therein mentioned, and for the purposes therein contained.

And the said Samuel Spencer, being by me first duly sworn, did depose and say: That he resided in the City of New York; that he is President of the said Southern Railway Company; that he knows the corporate seal of the said Company; that the seal affixed to the foregoing Plan is the corporate seal of the said Company, and was thereto affixed by authority of the Board of Directors of the said

Company, and that he signed [illegible] name thereto by like authority as President of said Company.

In witness whereof, I have hereunto set my hand and seals of office as Commissioner of Deeds for the State of Virginia, and as Notary Public for the City and County of New York, at my office this fourth day of December, 1894.

GEORGE H. COREY,
Commissioner for the State of Virginia in New York.

[Seal of George H. Corey, Commissioner for Virginia.]

GEORGE H. COREY,
Notary Public for the County of New York,
in the State of New York.

[Seal of George H. Corey, Notary Public, New York.]

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and County of New
99 York, and also Clerk of the Supreme Court in said City and County, the same being a Court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of acknowledgement of the annexed instrument, and thereon written was at the time of taking such proof or acknowledgement a Notary Public in and for the City and County of New York, dwelling in the said City, commissioned and sworn, and duly authorized to take the same and to administer oaths; and, further that I am well acquainted with the hand-writing of said Notary Public, and verily believe that the signature to the said certificate of acknowledgement is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 12th day of December, 1894.

[Seal of The Supreme Court, City and County of New York.]

HENRY D. PURROY, *Clerk.*

SCHEDULE "C."

By-Laws of the Southern Railway Company.

December 4, 1894.

Stockholders.

1. The annual meeting of the stockholders, for the purpose of electing Directors, and for the purpose of transacting such other business as may come before the meeting, shall be held on the Tuesday preceding the last Tuesday in October of each year, at the office of the Company in the City of Richmond, Virginia, and notice thereof shall be given for two successive weeks in a new-paper published in the City of Richmond.

2. A general meeting of the stockholders may be held at any time upon the call of the Board of Directors, or Stockholders holding together one-tenth of the capital stock upon their giving notice of the time and place for such meeting for thirty days in one of the principal newspapers published in the City of Richmond, the City of Knoxville, Tennessee and the City of New York.

30 3. To constitute a meeting of stockholders, there must be present, either in person or by proxy, those who can give a majority of all the votes which could be given by all the Stockholders. If a sufficient number fail to attend at the time and place for the meeting, those who do attend adjourn from time to time until a meeting shall be regularly constituted. A meeting of Stockholders may adjourn from time to time until their business is completed. No notice shall be necessary for the holding of an adjourned meeting.

4. At any meeting of the Stockholders each Stockholder may, in person or by proxy, duly appointed by instrument in writing subscribed by such Stockholder, duly attested and filed with the Secretary at or before the meeting, give one vote on each share of stock held by him in the same right.

5. In order to effect an organization, the meeting shall be called to order by the President, or in his absence by the First, Second or Third Vice-President, in order named, and a Chairman shall be elected. In the absence of the President and all the Vice-Presidents any Stockholders, or the duly appointed proxy of any Stockholder may call the meeting to order. The polls shall be opened as soon as the organization of the meeting shall admit of, and shall be kept open for one hour, under the supervision of three Tellers, who shall have been previously appointed by the Board of Directors; or if not so appointed or if in case of appointment, all of any of them shall fail to act, appointments to fill the vacancies shall be made at such meeting by its Chairman. The votes for Directors, or for determining any other question as above provided, shall be by ballot, and each Stockholder shall be entitled to one vote for each share of stock held by him.

As soon as may be after the polls are closed, the Tellers shall make and subscribe, and report to the meeting, a certificate of the result of the election, which shall be entered at large on the records; and thereupon each person elected shall be notified by the Secretary of his election.

The Directors may be residents of any part of the United States. In case of any person elected shall not, within thirty days

31 after the date of the notice of his election, signify his acceptance, the Board of Directors may declare a vacancy to exist.

6. Certificates of stock, signed by the President or one of the Vice-Presidents and by the Secretary or Assistant Secretary, and sealed with the corporate seal of the Company shall be issued to the Stockholders, subject to such rules and regulations as the Board of Directors may from time to time prescribe; and transfer of certificates shall be made only on the books of the Company, on the written order of the holder or his duly appointed attorney, upon surrender of the

original certificate. The transfer books shall be closed for at least ten days previous to, and on the day of, the annual meeting, and at and for such other times as the Board of Directors shall order.

7. When a person to whom such a certificate is issued alleges it to have been lost he shall file in the office of the Company, first, an affidavit setting forth the time, place and circumstances of the loss; second, proof of his having advertised the same, in a newspaper of general circulation published in the City of New York, once a week for two successive weeks; and, third, a bond to the Company with one or more sufficient sureties, with condition to indemnify all persons against any loss in consequence of issuing a new certificate in place of the former; and thereupon the Board of Directors may cause a new certificate to be issued.

8. For the convenience of security holders of the Board of Directors may arrange for an agency in New York for the transfer of Stock and of Registered Bonds of the Company; proper records of such transfers to be kept by such agency, and to be open to the inspection of the Secretary.

9. From and After the first annual meeting of the Stockholders the Board of Directors shall consist of nine members (of whom the President shall be one), who shall hold their office for one year, and until their successors are elected. Any vacancy in the Board may be filled by a majority of the Directors. A majority of the
32 Board shall be a quorum for the transaction of business.

10. Regular meetings of the Board shall be held on the second Thursday of January, April, July and October, and special meetings of the Board may be called by order of the President or of the Executive Committee, or of a majority of the Board and written notice of each meeting, whether regular or special, shall be delivered or mailed to each Director a reasonable time before the meeting. All such meetings shall be held either in Richmond, Knoxville or in New York City.

11. The Directors elected at the annual meeting shall meet as soon as may be thereafter, and they shall elect a President, a First Vice President, a Second Vice-President and a Third Vice-President of the Company, each to hold office for one year, or until the next election of the Directors, and until his successors is elected; and they shall also elect to hold office during the pleasure of the Board, a General Counsel, a Secretary and Treasurer, and they may also elect or appoint an Auditor. The President shall be elected from among the members of the Board.

12. The order of business at all meetings of the Board except adjourned meetings, shall be as follows:

1st. Reading the Minutes of the last meeting.
2nd. Correspondence.
3rd. Report of Officers.
4th. Reports of Standing Committees.
5th. Reports of Special Committees.
6th. Unfinished Business.
7th. Original Resolutions and New Business.

13. In case a vacancy shall have occurred in the office of the

President, First, Second or Third Vice-President, Secretary or Assistant Secretary, Treasurer or Assistant Treasurer or Auditor, the Board of Directors shall fill the same as early as practicable, and until so filled the President, or in his absence the First, Second or Third Vice-President in the order named, may make an appointment *pro tem.*, to fill the vacancy temporarily; or in case of temporary incapacity or absence of any officer, other than the President or
33 First, or Second Vice-President, in the order named may make an appointment *pro tem.*, to act in place of the officer so temporarily incapacitated or absent, but such appointment shall be subject to change by the Board of Executive Committee at any regular or special meeting thereafter.

14. The compensation of all officers of the Company shall be fixed by the Board of Directors from time to time. Each Director shall be paid ten dollars for each meeting of the Board, and of any committee of which he is a member, at which he shall attend, in addition to transportation and other expenses actually incurred, at the rate of not exceeding four cents per mile to and from his place of residence to the place of meeting.

15. The Board of Directors shall make a report to the Stockholders at their annual meeting.

The Corporate Seal.

16. The common corporate seal is, and until otherwise ordered by the Board of Directors shall be, an impression upon paper or wax of a circular device, such as that impressed upon the margin hereof, being an ornamental center surrounded by the words "Southern Railway Company, June, 1894," within, containing circumferential lines.

The Secretary of the Company shall procure, preserve and keep duplicate stamps suitable to make such impression of such corporate seal; and when and as directed by the special or general resolution of the Board of Directors or of the Executive Committee, the President, either of the three Vice-Presidents or the Secretary or Assistant Secretary, may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

President and Vice-Presidents.

17. The President shall preside at all meetings of the Stockholders and of the Directors. In his absence the First Vice-President, Second Vice-President or Third Vice-President, in the order named, shall preside. In the absence of the President and the First,
34 Second and Third Vice-presidents, the members present shall appoint one of their number to Preside. The President shall have general charge, control and supervision of all the business and affairs of the Company, and over all its officers, agents and employees, except when these By-Laws otherwise provide, or the Board shall otherwise direct, all officers and heads of departments of the Company shall be appointed by him and subject to removal by him.

18. The First Vice-President shall, during the absence or inability of the President, perform his duties. During the absence or inability of the President and First Vice-President, the Second Vice-President shall perform his duties and during the absence or inability of the President and First and Second Vice-Presidents; the Third Vice-President shall perform his duties. The Vice-Presidents shall also perform such other duties as may from time to time be assigned to them respectively by the President or by the Board.

19. All deeds of conveyance of the Company's lands, and all other instruments required to be executed by the Company itself, under its corporate seal, shall be signed by the President (or First, Second or Third Vice-President) for and in the name of the Company, except in such cases as the Board of Directors shall otherwise order; and the seal of the Company shall be thereto affixed by the President (or First, Second or Third Vice-President) or by the Secretary or Assistant Secretary, and attested by the Secretary or Assistant Secretary, and the execution thereof shall be acknowledged by the President (or First, Second or Third Vice-President) or other person designated by the Board to execute the same, as the act and deed of the Company, in such manner and form as may be required by law.

Other Executive Officers.

20. The Board of Directors shall have power to elect or appoint any other officers or assistants, who shall perform such duties as may be assigned to them by the Board by general rules, or from time to time; and who shall hold their office during the pleasure of the Board.

Committees.

21. There shall be an Executive Committee, consisting of four members of the Board, of whom the President shall be one. Other Committees, standing or special, may be appointed with such duties and powers as shall be assigned to and given them by the Board. Meetings of the Executive Committee may be called by order of the President, or of a majority of said Committee to be held at such convenient place or places as he or they shall appoint, on written notice delivered or mailed to each member thereof a reasonable time before the meeting and three members shall constitute a quorum.

In case of the anticipated absence of any member of the Executive Committee from any meeting of said Committee, or in case of inability of any member to attend such meeting the President (or First, Second or Third Vice-President, in the order named in his absence) may at any time before such meeting is called to order, appoint a Director to serve during such absence or inability in place of the absent member or of the member unable to attend, but such appointment shall not extend to more than one member absent or unable to attend, and any member of the Committee present at any meeting may object to such appointee before the meeting is called to order, in which case the appointment shall be void and of no

effect. No Vice-President shall be a member of the Executive Committee.

22. The Executive Committee, when the Board is not in session shall have and may exercise but only by the unanimous vote of all the members present at a meeting, all the powers of the Board of Directors; and they shall cause to be kept a full and accurate record of all the actions and proceedings, and report the same from time to time to the Board.

23. The said Committee shall have charge of all questions of finance, accounts and claims. It shall be the duty of this Committee from time to time, at their discretion, and whenever directed by the Board to audit and pass upon the accounts of the Treasurer, and to examine the transfer books of the Company; they shall report to the Board at every regular meeting and at any special meeting as occasion shall require.

36 24. All reports of Committees, standing or special, shall be made to the Board in writing, signed by the Chairman or by the members designated by the Committee to make the report.

25. All Committees shall be appointed by the President, unless it be otherwise directed by the Board. A majority of the members of all Committees shall be a quorum, except as limited in article twenty-one.

The General Counsel.

26. The General Counsel subject to the President and the Board of Directors shall have general charge and supervision of the legal business of the Company.

The Secretary.

27. It shall be the duty of the Secretary to attend all meetings of the Board of Directors and of the Stockholders, and of the Executive Committee, and record the minutes of their proceedings in suitable books to be provided for that purpose, and of which he shall be the custodian. He shall give due and timely notice to the Directors of all regular and special meetings of the Board, and of meetings of Committees to the members thereof. He shall take charge of all reports, resolutions and papers, after they shall be acted upon or submitted to the Board and also of all letters and papers pertaining to the general business of the Company, except the official bonds. He shall be the custodian of the seal of the Company, and it shall be his duty to affix the same to all such proper instrument as the Board or the President or either Vice-President may direct, or to allow the President or either Vice-President so to affix it. The Directors may, if they think proper, appoint an Assistant Secretary, who shall have his office in Richmond, and perform or assist in the performance of such of the above duties as they may prescribe.

28. The Stock Books shall be kept by the Secretary, and he shall also keep transfer books on which he shall register all transfers of stock and of registered bonds, and the names and addresses of all the

transferees, unless the Board of Directors should arrange for
7 a transfer agency in New York, in which case the said stock
books and other books in this section provided for shall be
kept there, subject to the supervision of the Secretary.

The Treasurer.

29. The Treasurer shall have his office in Richmond. It shall be his duty, either in person or through competent and faithful assistants, cashiers or disbursing officers, to receive and disburse, under the direction of the Board, all moneys belonging or coming to the Company; to keep regular full and true accounts of all receipts and disbursements, and to make detailed reports of the same to the Board of Directors at the regular meetings and at all other times when required.

30. The moneys and securities of the Company shall be kept in such bank or banks or other depository or depositories, as the Executive Committee or the Board may from time to time direct.

31. No payment shall be made except upon a sufficient voucher duly certified or approved by the proper officer.

32. The Treasurer and all other officers and agents who shall receive or disburse moneys, or have the custody of moneys or securities, shall give bonds, with sureties approved by the Board or by the Executive Committee, for the faithful discharge of their duties, and for the safe keeping and due delivery of the moneys, securities and other property of the Company committed to them or that shall come to their hands.

33. The Directors may, if they think proper, appoint an Assistant Treasurer, who shall have his office at such place as they may direct, and perform or assist in the performance of such of the above duties as they may prescribe.

Auditor.

34. The Auditor shall have direct charge of the general books and accounts of the Company; and it shall be his duty and he shall have power to enforce the system prescribed for keeping the same. He shall, on approval of the President or in his absence, of either of
8 the three Vice-Presidents, prescribe the form of all payrolls, vouchers, accounts, reports and returns of every description required in his department, and also the time at which the same shall be rendered. It shall be his duty to examine the accounts of all officers and employees and to see that the proper returns are made of all receipts for traffic and other sources and that correct vouchers are turned over to him for all disbursements for any purpose. There shall be returned to the Auditor, at such time in every month as he may prescribe, all bills and payrolls for the previous month, properly certified and made in detail. The Auditor shall approve and audit the same if found correct in every particular. But he shall not approve or audit any voucher or payroll unless it has been previously certified to by the head of the department in which it originated; and this approval

will not be held to relieve him from the duty of exercising due caution and diligence in satisfying himself that the voucher or payroll is correct and duly authorized. And in case of doubt it shall be his duty to refer it back to the officer certifying the same; and if the information furnished is not satisfactory, he shall refer it to the President, or, in his absence to either Vice-President. He shall also be the custodian of all bonds of officials and agents of the company handling funds. The Auditor shall have the right to appoint and remove all necessary assistants or clerks in his department, subject to the approval of the President, or in his absence, of either Vice-President and he shall be held responsible for the proper performance of their duties.

Amendments.

35. These By-laws may be altered, amended, added to or repealed at any regular meeting of the Board of Directors by a vote of two-thirds of all Directors of the Company, and provided written or printed notice of the proposed alteration, amendment, addition or repeal shall have been given at a previous regular meeting or they may be altered, amended or added to or repealed in like manner at any regular or special meeting, of which written or printed notice stating the object of the meeting as above shall have been
39 given or sent to each Director at least ten days previous to the time appointed for such special meeting; or they may be amended at any annual or general meeting of the stockholders by a vote of a majority in amount of all the shares.

"SCHEDULE D."

An act authorizing the purchasers of the Richmond Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers, and authorizing the leasing to or by, and the consolidation therewith, of other corporations.

(Approved February 20, 1894.)

Whereas, a certain suit in equity is now pending in the Circuit Court of the United States of America for the Eastern District of Virginia, wherein the Central Trust Company of New York is complainant, and the Richmond and Danville Railroad Company, a corporation created by and existing under the Laws of the State of Virginia, is defendant, in which suit it is sought to foreclose the consolidated mortgage, dated the twenty-second day of October, in the year one thousand eight hundred and eighty-six, and upon or about that day duly executed, acknowledged and delivered by said railroad corporation to said Central Trust Company of New York, and subsequently supplemented and confirmed by said railroad corporation by instrument dated November first, eighteen hundred and eighty-six, and April thirtieth, eighteen hundred and eighty-eight, respectively, in which suit also it is proposed to sell the whole of the mortgaged property and premises, being the rights, property, privileges

and franchises of the said the Richmond and Danville Railroad Company:

And, whereas, it is desirable and for the interest of this Commonwealth that the said railroad property be sold and reorganized in such manner and under such conditions as to secure the largest and best possible facilities and advantages of transportation and communications for the people of this State; now, therefore:

40 1. Be it enacted by the General Assembly of Virginia, the purchaser or purchasers of the said mortgaged premises of the said the Richmond and Danville Railroad Company at the foreclosure sale thereof in the course of the said suit in equity, and such person or persons as he or they may associate with himself or themselves, shall forthwith be, and they hereby are, constituted a body politic and corporate by the name which they may select, as set forth in the conveyance of said mortgaged premises, or in any writing signed by him or them and recorded in the Court in which the said conveyance shall be recorded, and such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroad and other property, with their appurtenances and all the franchises, rights and privileges had and possessed by the said Richmond and Danville Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code; provided, however, that said new corporation shall not be limited as to the amount or classification of its stock or bonds, except that the total amount of stock issued shall not exceed three and fifty million dollars, and shall have no immunity from any lawful State, County or municipal taxation by reason of its former charter of any law heretofore exempting it from taxation.

2. Such purchaser or purchasers may associate with him or them any number of persons in the organization of the new corporation, which may create and issue its stock and its bonds secured by mortgage or otherwise, according to any plan adopted by such purchaser, or purchasers and filed as hereinafter provided.

3. It shall be the duty of such new corporation within six months after the conveyance to it of said mortgage premises to execute a certificate in writing under its common seal attested by the signature of its President or Vice-President, referring to the sale and

41 conveyance by which it shall have acquired title to such premises and the plan of organization adopted by the purchasers the amount and classes or kinds of capital stock and mortgage bonds or other obligations authorized to be issued, and also specifying the name of such new corporation and of its President, and the number and names of its Directors, which certificate shall be filed in the office of the Secretary of the Commonwealth of Virginia, and certified copy thereof shall be conclusive evidence of the existence of such new corporation.

4. In addition to its other powers, such new corporation shall have and from time to time as occasion arises may exercise, the following powers, or any of them, namely:

(*a*) With the approval of a majority of its stockholders, given at a meeting, it may from time to time, lease, use, operate, consolidate with, or purchase or otherwise acquire, or be leased, used, operated by or consolidated with any railroad or transportation company now or hereafter incorporated by the laws of the United States, or any of the States thereof, or any one or more such railroad or transportation companies, or any other railroad or transportation company or companies which now are or hereafter may be leased or used or operated by or consolidated with any one or more of such railroad or transportation companies; and, from time to time, it may consolidate its capital stock, property and franchises, by change of name or otherwise, with the capital stock, property and franchises of any other railroad or transportation company, power being hereby granted to any railroad or transportation company or companies incorporated by or under any act or acts of the General Assembly of the State of Virginia, with the approval of a majority in amount of its or their shareholders respectively given at a meeting, to make and carry out such contracts of consolidation or lease, sale or other method of acquisition; provided that, in all consolidations, a copy of the agreement therefor shall be filed in the office of the Secretary of the Commonwealth of Virginia, and that any corporation with which said new corporation may consolidate, or which it may lease shall be or remain subject to the jurisdiction of the Courts of this State, and all lines of railroad operated by it in the State of Virginia, shall be subject to the general laws of the State; and provided further that any stockholder who dissents from any such consolidation may within sixty days thereafter apply by petition to the Circuit Court of the City of Richmond to determine the value of his stock, and shall be entitled to receive from the new corporation the value as thus determined of such stock upon transfer thereof to the new corporation.

(*b*) It may from time to time purchase, own and hold bonds or other evidences of debt, and shares of the capital stock of any railroad company or companies formed under the laws of this or any other State, and from time to time may guarantee or assume the bonds, evidences of indebtedness or capital stock of any such railroad company.

(*c*) It may from time to time acquire or guarantee the stocks and bonds or either, of any inland coast or ocean transportation company or companies, operating to or from any point on its lines; and it may develop or aid in the development of its business by acquiring or guaranteeing the stocks and bonds or either, of hotel, lighterage, wharf, elevating and other enterprises convenient in connection therewith or as part thereof.

5. Said new corporation may issue its capital stock of one or more classes or kinds, and in one or more series or grades, with such preferences, conditions and voting power as shall be provided in said plan of organization, and from time to time it may increase or decrease the amount of any class or kind or grade of such stock as shall be provided in said plan of reorganization, or with the approval of a majority in amount of the stockholders, given at a meeting of

stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued. The shares of each class of stock shall be of such par amount, and shall entitle the holders to such vote respectively as shall be determined in the said plan of reorganization or by the stockholders in like manner.

43 6. Such new corporation may borrow money and issue bonds or other evidence of indebtedness therefor, and may secure the same, from time to time, by mortgage or deed of trust upon any or all of its property and franchises, and such new corporation, from time to time, may issue and sell its bonds and its capital stock at such prices and on such terms as shall be specified in said plan of organization, or as a majority in amount of the stockholders shall approve at any meeting, and may receive in payment therefor property, securities or shares in any corporation mentioned in this act, and any stock so issued shall be deemed fully paid and free from any liability.

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five members, and one of their number shall be chosen as President. The stockholders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its directors, officers and agents and in and by such by-laws the stockholders may prescribe how such by-laws may be amended or repealed; provided, however, that until such by-laws shall be adopted by the stockholders the corporation shall be governed by by-laws adopted in accordance with the plan of organization.

8. The principal office of the Company shall be in the City of Richmond, in this State, at which all meetings of the stockholders shall be held; and all other offices and workshops of said Company shall be located in the State of Virginia, as far as the same may be practicable.

9. It shall be lawful for the Circuit Court of the City of Richmond, upon the petition of the President and Board of Directors, at any time to order a change in the name of the Company; but any such change of name shall be without prejudice to the rights of any creditors, or to the exercise of any of the powers and privileges as granted by this act.

10. There shall be paid to the Clerk of the County or corporation in which any mortgage authorized by this act may

44 be presented for recordation, the existing rate of taxation for such recordation upon the assessed value of the roadbeds, depots, station building and lots, and machine shops, fixtures and rolling stock, and any real estate not included in said enumeration, in the State of Virginia, conveyed in such mortgage; and upon presentation to the Clerk of the County or corporation where it is proposed to record said mortgage of a certificate of the Auditor of the State of the amount of the assessed values of the said property within the State of Virginia, and upon the payment of the tax thereon to the said Clerk, the said mortgage shall be recorded without other charge than the clerical fees provided in such cases. Certi-

fied copies of such mortgage may be recorded in any County of Virginia in which property covered by such mortgage may be located upon payment of clerical fees.

11. All taxes and debts due or to become due the State of Virginia by the corporation shall be paid in lawful money of the United States and not in coupons.

12. This act shall be in force from its passage.

February 28, 1904.

(A copy.)
(Signed) J. BELL BIGGER,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

COMMONWEALTH OF VIRGINIA:

I, Chas. T. O'Ferrall, Governor of the Commonwealth of Virginia, certify that J. Bell Bigger, whose name is signed to the within copy of an Act of Assembly bearing date the 28th day of February, 1894, is and was at the time of signing Clerk of the House of Delegates and Keeper of the Rolls of Virginia, duly elected and qualified; that he is authorized by the laws of this State to make and sign such copy of an act, and that to all his official acts full faith, credit and authority are due and ought to be given.

In testimony whereof, I have hereunto set my hand as Governor, and caused the great seal of the State to be affixed. Done at
45 the City of Richmond this 28th day of February, A. D. 1894, and in the one hundred and eighteenth year of the Commonwealth.

(Signed) CHAS. T. O'FERRALL.

[Great Seal of Virginia.]

By the Governor.
(Signed) J. T. LAWLESS,
Secretary of the Commonwealth
and Keeper of the Seals.

Office of the Secretary of the Commonwealth and Keeper of the Seals of Virginia, Richmond, Virginia.

COMMONWEALTH OF VIRGINIA:

I, ——— ———, Secretary of the Commonwealth of Virginia, certify that the foregoing is a true copy of the certificate of the Southern Railway Company, a corporation created by and existing under an Act of Assembly of the State of Virginia, approved February 20, 1894, as mentioned in Section 3 of said Act, which certificate was duly filed in my said office on the 14th day of December, 1894.

Given under my hand and the lesser seal of the Commonwealth, at Richmond, this — day of —— A. D. ——.

[SEAL.]

———— ————,
Secretary of the Commonwealth and
Keeper of the Seals of Virginia.

An act to provide for the reduction of the capital stock and the issue of special stock of the Southern Railway Company.

Approved January 23, 1900.

Whereas, pursuant to the provisions of the Act of Assembly of the Commonwealth of Virginia, approved February twentieth, eighteen hundred and ninety-four, the purchasers of the Richmond and Danville Railroad did constitute themselves a body politic and corporate by the name of Southern Railway Company, and also as provided by said Act, within six months after making their purchase did adopt and did file in the office of the Secretary of the Commonwealth their certain plan of organization dated December
46 four, eighteen hundred and ninety-four, whereby, among other things, they did certify that the said purchasers and the Southern Railway Company had fixed the capital stock of the corporation at one hundred and eighty million dollars, divided into one million eight hundred thousand shares, each of the par value of one hundred dollars, of which six hundred thousand shares are preferred stock and the remainder are common stock, the corporation reserving the right to increase such capital stock up to, but not exceeding the limit authorized by the said act, approved February twentieth, eighteen hundred and ninety-four, and the right to increase or to decrease the amount of any class or kind or grade of its capital stock, and also to redeem and to purchase at par any and all preferred stock of any kind, class or grade thereof; and further did certify that with the exception of one thousand shares of common stock theretofore issued or reserved to qualify Directors, or for other purposes, all of the Stock of the Company had been duly issued and delivered to J. Pierpont Morgan, Charles Lanier and George F. Baker, and their successors, as Voting Trustees, under an agreement dated October, fifteenth, eighteen hundred and ninety-four, with the exclusive right and privilege in said Voting Trustees, during the continuance of their trust as provided in said agreement to vote upon and in respect of all stock so issued to them, also to collect and receive all dividends declared in respect of such stock, and to distribute any such dividends among the holders of their stock trust certificates, which holders in due course would be entitled to receive in exchange therefor certificates for corresponding amounts and kinds of the capital stock of the Southern Railway Company; and

Whereas, from time to time the said corporation has issued stock certificates for the full amount of one million eight hundred thousand shares, each of the par value of one hundred dollars of which six hundred thousand shares are preferred stock, and one million two hundred thousand shares are common stock, all of which stock cer-
tificates (excepting those for such one thousand shares of
47 common stock) have been duly issued to, and now are held by the said Voting Trustees under the said Voting Trust agreement dated October fifteenth, eighteen hundred and ninety-four; and

Whereas, in and by said Section five of the said Act, approved February twentieth, eighteen hundred and ninety-four, it was provided that the said new company might issue its capital stock of one

or more class or kinds and in one or more series or grades, with such preferences conditions and voting power as should be provided in said plan of organizations and voting power as should be provided in said plan of organization; and from time to time might increase or decrease the amount of any class or kind or grade of such stock as should be provided in the plan of organization, or with the approval of a majority in amount of the stockholders given at a meeting of the stockholders called for that purpose, unless and except as otherwise expressly provided in certificates representing stock previously issued; and that the shares of each class of stock should be of such par amount, and should entitle the holder to such vote, respectively, as should be determined by said plan of organization, or by the stockholders in like manner; and

Whereas, no express provision concerning any increase or decrease of the common capital stock is contained in any outstanding certificate representing common stock, and it is deemed desirable for the interests of the company and of the Commonwealth that the nominal value of such common stock shall be reduced so as to conform more nearly to the market value thereof; now, therefore,

1. Be it enacted by the General Assembly of Virginia: That in the manner hereinafter provided with the consent of holders of a majority of all outstanding stock of the Southern Railway Company, including at least a majority of outstanding common stock, the Board of Directors of the Company, from time to time in reduction of the amount of its stock, may issue one share of a new or special stock as hereinafter described, in lieu and instead of the issue of two shares of the stock authorized by said Act approved
48 February twentieth, eighteen hundred and ninety-four, but not heretofore issued, or in exchange for every two shares of the common stock now outstanding that may be surrendered for that purpose and cancelled. The Company may agree to pay a dividend or other cash sum in connection with such exchanges of outstanding common stock; the amount of such dividend or other cash sum to be fixed by the Board of Directors, and payment thereof to be made at such time and in such manner as in its discretion the board may determine. The consent hereunder of stockholders may be given either in writing or by vote at a meeting or by a combination of consents in writing or by vote.

2. Holders of stock trust certificates may authorize the Voting Trustees as holders of the corresponding amount of stock to consent to such reduction, and may confer any other authority upon the voting Trustees by presentation of such certificates to the Voting Trustees, in order that a notation of such authority may be stamped thereon. Such stamp on any stock certificate shall be conclusive proof that the holder thereof has given such authority, which shall bind all transferees of such certificate and of any interest thereby represented and shall be irrevocable. In exchange for stock trust certificates stamped as aforesaid there shall be issued stock trust certificates either in the present form, similarly stamped, or in a new form adapted to the conditions as altered under this Act.

3. If and when the holders of a majority of the outstanding stock, including such amount of the outstanding common stock (not less

a majority thereof) as shall be satisfactory to the Board of ctors, shall have consented to the reduction herein authorized, Company from time to time within such period or periods as l be prescribed or extended by the Board of Directors, shall issue w certificate for one share (of the par value of one hundred dol-) of the special stock authorized by this Act in exchange for y two shares of outstanding common stock surrendered for that purpose; and as hereinbefore authorized thereupon shall make payment of such dividend or other cash sum, if any, as it may have agreed to pay.

All such special stock, whether issued as herein permitted in of authorized common stock, or in exchange for outstanding mon stock, shall be distinguished by printing on or in the cer- ates to be issued therefor, a statement that such stock was issued er the provisions of this Act. Until more than ninety-five per um of the common stock then outstanding shall have been ex- nged as herein permitted and thereafter until otherwise deter- ed by the Board of Directors, each share of such special stock l entitle the holder thereof to receive the same dividends as ugh he were the holder of two shares of present common stock etofore converted into such one share of special stock.

From time to time, in exchange for such amount of special k as under this Act shall be issuable therefor, the Voting Trus- may surrender to the Company certificates for present common k to the amount which by stamping or otherwise shall have been norized by the holders of common stock trust certificates; and at termination of the voting trust the holders of such stamped com- stock trust certificates shall receive from the voting Trustees, in of the common stock so surrendered to the Company and men- ed in such trust certificates special stock to the extent of one- of such amount of such common stock. Any dividend or other sum that may be received by the Voting Trustees in connection such exchanges of common stock shall be payable by them to holders of the stamped common stock trust certificates at such or times as the Voting Trustees may determine. After the ination of the Voting Trust, the Voting Trustees, and the Board Directors, upon such terms as they may deem expedient, may e arrangements for the issue of special stock in redemption of amped common stock trust certificates then outstanding.

Nothing in this Act contained shall impair the existing and continuing right of the Southern Railway Company to in- crease or to decrease its capital stock of any class or grade, whether preferred, special or common, under and in accord- with said Act of Assembly, approved February twentieth, teen hundred and ninety-four. With the approval of the hold- f a majority of the capital stock, given at a meeting of the stock- ers called for that purpose after the termination of the voting , the company may decrease the number of shares of common to one-half the amount thereof by reducing the number of s of common stock of one hundred dollars each then held by stock-holder to one half of such number.

7. This act shall be in force from its passage.

A true copy,
Teste:

——— ———,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

Date: —— —, —.

An act to amend and re-enact section 8 of an act approved February 20, 1894, entitled "an act authorizing the purchasers of the Richmond & Danville Railroad, their assigns and successors, to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations."

Approved February 26, 1902.

1. Be it enacted by the General Assembly of Virginia: That Section seven, of an Act, approved February twentieth, eighteen hundred and ninety-four, entitled "An Act authorizing the purchasers of the Richmond and Danville Railroad, their assigns and successors to become and be a corporation, to adopt a name therefor, and to possess and exercise general powers; and authorizing the leasing to or by, and the consolidation therewith of, other corporations," be and hereby is amended and re-enacted to read as follows:

7. The business, property and concerns of said corporation shall be managed by a Board of Directors consisting of not less than five nor more than fifteen members, and one of their number
51 shall be chosen as President. The corporation, at a general meeting or at an annual meeting may from time to time increase or decrease, within the limits hereinbefore fixed, the number of Directors to be elected at the next annual meeting, but in case of such increase or decrease, the number to be elected shall be specified in the notice of the meeting at which the election is to be held. By the vote of a majority of the stockholders present or represented at any general meeting or at any annual meeting, the corporation may classify its Directors into three classes, as nearly as may be equal in number. In case such classification is made, the term of office of the Directors of the first class shall expire in one year, of the Directors of the second class in two years, and of the Directors of the third class in three years, from the annual meeting at which the first Directors so classified are chosen under this Act and at each annual meeting thereafter, the Directors then to be elected shall be elected for three years. Every Director shall continue in office until expiration of the term for which he was elected, and until his successor shall have been elected and shall have accepted his office.

All vacancies shall be filled and all Directors for whose election provision is not otherwise made in this Act, shall be elected in accordance with the by-laws. The stock-holders may adopt by-laws for the government of the stock, property and concerns of the corporation, and for the regulation of its Directors, officers and agents, and in and by such by-laws the stockholders may prescribe how such by-

may be amended and repealed, provided, however, that until wise voted by the stockholders, the corporation shall be gov- by the by-laws of the Southern Railway Company, adopted in dance with the plan of organization of the Southern Railway any filed in the office of the Secretary of the Commonwealth December the fourth, eighteen hundred and ninety-four.

All acts and parts of acts inconsistent herewith are hereby repealed.

3. This Act shall be in force from its passage.

True Copy,
ste:

——— ———,
Clerk of the House of Delegates and
Keeper of the Rolls of Virginia.

te, ——— —, —.

IONWEALTH OF VIRGINIA:

——— ———, Governor of the Commonwealth of Virginia, certify ——— ——— whose name is signed to the within copies of Acts of bly of Virginia, approved, respectively, February 20, 1894, ary 23, 1902, bearing date the — day of ———, —, is, and was, time of such signing, Clerk of the House of Delegates and r of the Rolls of Virginia, duly elected and qualified; that he horized by the laws of this State to make and sign such copies ts of Assembly of Virginia; that such attestation is in due and by the proper officer, and that to all his official acts full credit and authority are due and ought to be given.

I further certify that ——— ——— whose name is signed to ithin attestation of the Certificate of Southern Railway Com- mentioned in Section 3 of the Act of Assembly of Virginia, ap- l February 20, 1894, bearing date the — day of ——— is, and the time of such signing, Secretary of the Commonwealth of nia, duly elected and qualified; that he is the keeper of the ls in which said certificate is recorded, and that he is authorized e laws of this State to make and sign such attestation; that attestation is in due form and by the proper officer, and that his official acts full faith, credit and authority are due and to be given.

testimony whereof, I have hereunto set my hand as Governor, aused the great seal of the Commonwealth to be affixed.

ne at the City of Richmond this — day of ——— in the year of ord and in the — year of the Commonwealth.

By the Governor:

——— ———,
Secretary of the Commonwealth
and Keeper of the Seals.

EXHIBIT "B."

AUDITOR'S OFFICE,
MONTGOMERY, ALABAMA, *July* 16, 1894.

$250 00

State Treasurer will receive of the Southern Railway Company, a corporation created under the laws of State of Virginia, with a capital stock of one hundred and eighty Millions ($180,000,000) dollars, the sum of two hundred and fifty and no 100 dollars being a full payment of the fee required by the provisions of "an act to require all corporations to pay a fee or license for the use of the State before commencing business in this State" approved February 18th, 1893.

JOHN PURIFOY, *Auditor.*

No. 3335.

STATE OF ALABAMA,
OFFICE OF STATE AUDITOR.

I, W. W. Brandon, State Auditor, hereby certify that the foregoing is a true and correct copy of the certificate issued by the auditor of the State of Alabama dated July 16, 1894, authorizing the payment into the State Treasury by the Southern Railway Company of the fee required to be paid by said Railway Company under Act approved February 18, 1893, and that under said certificate the State Treasurer was charged with the amount stated therein, towit: $250.00; and that the records in this office show the following entry made therein as to the payment of said amount: "Receipts into State Treasury during the fiscal year ending September 30, 1894, July 16, 1894. Corporations. From Southern Railway Company, organized under the State of Virginia, with a capital stock of $180,000,000 full payment of fee under Act approved February 18th, 1893."

Given under my hand and the seal of office, this March
54 30, 1907.

[SEAL.] W. W. BRANDON,
State Auditor.

I, Frank N. Julian, Secretary of State in and for the State of Alabama do hereby certify that the Southern Railway Company, a corporation chartered under the laws of Virginia, has on file in this Department a copy of the charter of the Company, and did file in this Department on the 16th day of July, 1894, an instrument in writing designating J. M. Bridges, Selma, Alabama, as the agent of such Company in this State.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of State, at the Capitol, in the City of Montgomery, this Third day of April, one thousand nine hundred and seven.

[SEAL.] FRANK N. JULIAN,
Secretary of State.

Exhibit "C."

the Judge of Probate, Jefferson County, State of Alabama:

The Southern Railway Company, a corporation organized under laws of the State of Virginia, files the following statement under Act approved March 7th, 1907, entitled "An Act to provide for revenue of the State and requiring all foreign corporations au-rized to do business in this State under the laws of the State of bama, to pay an annual franchise tax."

t does this protesting at the time that the said Act is, so far as Southern Railway Company is concerned, invalid and that this npany is not bound in law to make any returns thereunder, and y makes such return under such protest.

The name of the corporation is Southern Railway Company. It incorporated under the laws of the State of Virginia. Its prin-al place of business in the State of Alabama is Birmingham, ferson County, Alabama. The total amount of its capital stock is 0,000,000; of this $60,000,000 is preferred stock and $120,000,-0 common stock. The par value of each series is $100.00. The rket value of the preferred stock is $31 per share, the market value of the common stock is $9.50 per share. The actual amount of capital employed in the State of Alabama by the Southern Railway Company in the year 1907 was $6,052,-2.23. This statement is based on the fact that the above was the unt employed and expended by the Southern Railway Com-y in the operation of its property in the State of Alabama for l year.

To the end that if the Probate Judge is of opinion that the above ement does not, according to a proper interpretation of the law ermine the actual amount of the capital of the Southern Railway npany employed in the State of Alabama in the year 1907, the npany now states what is the assessed value of its property made the State Board of Assessments, and also by the local authorities:

Total Alabama Assessment, 1907, Southern Railway Co.

oads & Cos.	Value Main line.	Value Branch.	Value S track.	Value Roll stock.	Value local.
Akron Branch:					
las.....	$27,200	.....	$775	$4,100	
ry	180,000	.....	2,525	36,900	$2,805
e.....	216,800	.....	6,600	11,000	2,890
	$424,000	.....	$9,900	$82,000	$5,695
Bloeton Branch:					
lby.....	$352,800	.....	$14,115	$61,110	$3,000
erson.....	92,400	.....	3,535	15,520	
b.....	134,400	.....	17,355	20,370	1,525
	$579,600	.....	$95,305	$97,000	$4,525

Total Alabama Assessment, 1907, Southern Railway Co.—Continued.

Roads & Cos.	Value Main line.	Value Branch.	Value S. track.	Value Roll. stock.	Value local
Georgia Pacific:					
Cleburne	$351,000		$14,520	$81,000	$3,950
Calhoun	509,400		40,900	126,000	8,170
Talladega	190,800		6,900	45,000	905
St. Clair	390,600		21,330	90,000	3,425
Jefferson	775,800	$100,920	455,230	180,000	191,625
Walker	619,200		114,300	144,000	64,235
Fayette	576,000		24,040	144,000	15,976
Lamar	376,200		6,130	90,000	3,020
Marion					10,000
Tuscaloosa					40
Pickens					80
Winston					2,500
	$3,789,000	$100,920	$683,350	$900,000	$303,936
Memphis Division:					
Jackson	$641,700		$28,880	$135,594	$10,330
Madison	456,475		34,360	100,140	27,000
Limestone	185,070		5,160	40,176	2,305
Morgan	121,675		23,400	30,132	5,800
Lawrence	323,020		7,040	65,286	3,185
Colbert	611,785		27,240	130,572	18,750
	$2,339,725		$126,080	$502,200	$67,370
56 Florence Branch:					
Colbert	$177,000		$31,050		$42,940
Lauderdale	72,000		6,390		485
	$249,000		$37,440		$43,425
Meridian Sub.:					
Dallas	$248,000		$12,915	$60,000	$
Perry	61,000		7,245	14,000	1,515
Hale	25,000		1,050	6,000	505
Marengo	210,000		11,130	60,000	3,450
Sumter	234,000		5,040	60,000	3,025
	$778,000		$37,380	$200,000	$8,495
Mobile Jct. C. O.:					
Jefferson	$32,800		$90		
Rome & Decatur:					
Cherokee	$148,200		$15,280	$15,747	$1,800
Etowah	106,200		17,200	11,403	6,105
	$254,400		$32,480	$27,150	$7,905

Total Alabama Assessment, 1907, Southern Railway Co.—Continued.

Roads & Cos.	Value Main line.	Value Branch.	Value S. track.	Value Roll. stock.	Value local.
Selma Sub.:					
Cherokee.....	$152,100	.....	$56,040	$21,000	$1,725
Calhoun.....	127,700	.....	45,320	63,000	54,600
Talladega.....	546,000	.....	25,120	84,000	9,630
Shelby.....	110,800	.....	21,560	63,000	4,430
Gibb.....	236,600	.....	12,160	46,500	1,385
Chilton.....	159,900	.....	11,640	21,000	1,330
Autauga.....	94,900	.....	6,000	10,500	715
Dallas.....	198,900	.....	32,600	41,000	52,920
	$2,226,900	.....	$210,140	$350,000	$126,735
Total Sou. Ry. Co...	$10,673,425	$100,920	$1,232,465	$2,158,350	$568,086

Totals:	
Akron Branch.....	$521,595
Bloecton.....	776,430
Georgia Pacific.....	5,777,206
Memphis Division	3,035,375
Florence Branch.....	329,865
Meridian Sub.....	1,023,875
Mobile Jct. C. O.....	32,890
Rome & Decatur.....	321,935
Selma Sub.....	2,914,075
Grand total.....	$14,733,246

Besides this the Southern Railway Company operates the railroad of the Mobile and Birmingham Railroad Company and owns the rolling stock with which such operation is conducted. A statement of the assessed value of the Mobile and Birmingham Railroad is as follows:

Mobile & B'ham:

	Value Main line.	Value S. track.	Value R. stock.	Value local.	Total value.
Dallas.....	$151,200	$4,800	$18,700	$940	$175,640
Wilcox	237,600	9,300	30,600	3,565	281,065
Clarengo.....	19,800	420	3,400	600	24,220
Clarke.....	386,400	20,130	49,300	8,795	464,316
Washington...	247,500	1,830	30,600	1,465	284,395
Mobile.....	294,750	32,640	37,400	153,620	520,419
	$1,336,950	$72,120	$170,000	$170,985	$1,750,055

The Mobile and Birmingham Railroad Company is a corporation organized under a charter granted by the State of Alabama. (See Acts of Alabama 1896-7, No. 197, page 493, approved February 3, 1897.) This Company executed in the year 1895 a mortgage to secure $1,000,000 of 5% bonds due July 1, 1945. This mortgage was made to the Central Trust Company of New York, and was dated August 29th, 1895, and at least $600,000 of these bonds are outstanding. On the same date the Mobile and Birmingham Railroad Company executed to the Central Trust Company of New York (for which was later substituted the Mercantile Trust Company of New York) as Trustee, a deed of trust to secure $1,200,000 of bonds due July 1, 1945, to be income bonds until July 1, 1899, and thereafter to bear 4% interest. All of these bonds are outstanding. On March 1, 1899, the Mobile and Birmingham Railroad Company leased its line, being a line of railroad from Mobile to Marion Junction, running through the counties of Mobile, Washington, Clarke, Marengo, Wilcox and Dallas, to the Southern Railway. The terms of this lease are substantially as follows: It is for ninety-nine years, renewable forever. The rental is an amount sufficient (*a*) to pay fixed charges; (*b*) to pay a dividend on $900,000 of preferred stock. There is outstanding $900,000 of preferred stock and $900,000 of common stock. The Southern Railway Company owns substantially all of the common stock and has the voting power of the preferred stock.

The Southern Railway Company submits that in no event should any part of the assessed value of the property of the Mobile and Birmingham Railroad Company, exclusive of the rolling stock, which belongs to the Southern Railway Company be considered as
58 included in the "actual amount of the capital employed by the Southern Railway Company in the State of Alabama." The total assessed values of the property of the Southern Railway Company, including the rolling stock used on the Mobile and Birmingham Railroad Company is $14,903,246. If the value of the Mobile and Birmingham Railroad Company is added it would be $16,483,301.

H. W. MILLER.
Assistant to First Vice-President and Chief Executive as to Matters of Taxation Southern Railway Company.

R. D. LANGFORD, *Secretary.*

Sworn to and subscribed before me this 29th day of February, 1908.

Witness my seal of office.

S. E. GREENE.
Judge of Probate.

In consideration of the above the Probate Judge of Jefferson County finds that the actual amount of the capital of the Southern Railway Company employed in the State of Alabama in the year 1907 was $14,903,246. This sum is arrived at by taking the assessed

alue of its property as stated in its return, exclusive of the value of
he property of the Mobile and Birmingham Railroad Company,
cept its rolling stock, which is included in the amount fixed above
the value of the property of the Mobile and Birmingham Railroad
ompany, besides the rolling stock used in its operation were, under
proper construction of the law, to be considered a part of the
mount of the capital employed by the Southern Railway Company
the State of Alabama, this would add to the above amount the
m of $1,580,055 making a total of $16,483,301. Under my com-
utation of the actual amount of the capital employed by the South-
rn Railway Company in the State of Alabama for the year 1907,
11,903,246, the following is the tax due as provided in this act
nder which the above report is made, two-thirds of which belongs
the State and one-third of which belongs to the County, namely,
22,458.36.

S. E. GREENE,
Judge of Probate.

STATE OF ALABAMA,
Jefferson County:

I hereby certify that the within statement was filed in my office
r record February 29th, 1905.

S. E. GREENE,
Judge of Probate.

EXHIBIT "D."

the matter of the report of the Southern Railway Company to the
Judge of Probate of Jefferson County, State of Alabama, under an
act approved March 7th, 1907, entitled "An Act to provide for the
revenue of the State by requiring all foreign corporations author-
ized to do business in this State under the laws of the State of
Alabama to pay an annual franchise tax."

The Southern Railway Company has heretofore returned to you
nder protest its report under the above entitled Act, and you have
ound under said report that there is due by the Southern Railway
ompany the sum of $22,458.36, forthwith payment of which you
ave demanded from said Company with the consequences following
delinquency announced by the provisions of said Act. This sum
he Southern Railway Company now pays to you under protest and
nder duress of the penalties prescribed by the said act for failure to
ake such payment. The Southern Railway Company hereby no-
fied you not to pay over said money, or any part thereof, to the
uthorities of the State of Alabama, or the County of Jefferson and
ereby notifies you that it proposes within thirty days from this date
bring suit against you for the recovery of said money upon the
round that the said act is, so far as the Southern Railway Company
concerned, invalid, and if not entirely invalid, partially so, and
pon the further ground that if the said act is valid you have adopted
erroneous construction of said act as to the actual amount of

capital employed, and by doing so have required the Southern Railway Company to pay an amount largely in excess of what is due by it under a proper construction of said act, if the same is a valid act.

60 The Southern Railway Company hereby waives compliance on the part of the Probate Judge with the requirements of the above act, approved March 7th, 1907, as to the proceedings on the part of the Probate Judge to correct or change the return as to the amount of the capital employed in the State.

Witness the hand of the Southern Railway Company this February 29th, 1908.

SOUTHERN RAILWAY COMPANY,
By JAMES WEATHERLY,
Its Attorney in Fact.

To Hon. S. E. Greene, Judge of Probate Court of Jefferson County:

Referring to the above, I hereby acknowledge payment to me by the Southern Railway Company of $22,458.36, whereof $14,972.24 is on account of State tax and $7,486.12 is on account of County tax, which I acknowledge to have been paid by it under protest and under duress, and I hereby acknowledge the receipt of the notice contained in the above, warning me against paying over said money, unless said Southern Railway Company shall fail for thirty days from the date hereof to bring suit to recover the same.

Witness my hand this February 29th, 1908.

S. E. GREENE,
Judge of Probate.

Filed in office Mar. 26, 1908.

JOHN S. GILLESPY,
Clerk & Register.

In the City Court of Birmingham, Alabama.

SOUTHERN RAILWAY COMPANY, a Corporation under the Laws of the State of Virginia, Plaintiff,

vs.

SAMUEL E. GREENE, Defendant.

Demurrer.

Comes the defendant in the above styled cause, and demurs to the complaint and each count thereof, filed in said cause and for grounds of demurrer, assigns the following:

1. Because it appears from said complaint that said tax complained of was legally levied and assessed against plaintiff.

61 2. Because it appears from said complaint that the act of the Legislature of Alabama, imposing the tax complained of, is constitutional and valid.

3. Because neither the act complained of, nor the enforcement thereof is in violation of Section 22 of Article I of the Constitution of Alabama, or any other provision of said Constitution.

4. Because neither the act complained of, nor the enforcement hereof is in violation of Section 10 of Article 1 of the Constitution of the United States or of Section 1 of the Fourteenth Amendment to the Constitution of the United States, or of any provision of said Constitutions.

5. Because said act complained of, in so far as it levies or imposes the tax complained of, is not in violation of the provisions of the Constitution of the State of Alabama, or of the provisions of the Constitution of the United States, relied on by plaintiff in said complaint, or of any other provisions of said Constitution or either of them.

6. Because said complaint shows that plaintiff is a corporation created under the laws of the State of Virginia, and is engaged in an intra-state business in Alabama, and does not aver or show that said plaintiff is not operating any railroad in the State of Alabama other than railroads purchased by it under the authority of the laws of the State of Alabama, or that it is not engaged in any business in the State of Alabama, other than the business of operating said railroads so purchased.

7. Because said complaint shows that plaintiff is a corporation under the laws of the State of Virginia, and engaged in an intra-state business in the State of Alabama, and fails to aver or show that prior to the purchase or lease of the railroads alleged in said complaint to have been purchased under the authority of the laws of the State of Alabama, a meeting of the stockholders of the plaintiff corporation and a meeting of the stockholders of the corporation or companies owning the roads purchased or leased, had been called and held at a time and place and in a manner designated, and that the 62 holders of a majority in value of the stock of each corporation or company represented at such meetings, in person or by proxy, and voting thereat, assented to said purchase or lease, as required by Section 1170 of the Code of Alabama of 1896.

8. Because said complaint fails to aver that at the time plaintiff purchased or acquired the first of the railroads alleged in said complaint to have been purchased or acquired, it was owning or operating by lease or otherwise any railroad in the State of Alabama.

9. Because said complaint fails to aver or show that plaintiff, at the time it purchased the railroads alleged in said complaint to have been purchased, owned all of the capital stock of the corporations owning the railroads so purchased.

10. Because said complaint fails to aver or show, except by the averment of a legal conclusion, that it was authorized to purchase or acquire the railroads in this State, alleged in said complaint to have been purchased.

11. Because the averments of said complaint do not show any contract between plaintiff and the State of Alabama which is impaired by the levy of the tax complained of or any denial of the equal protection of the law in the levy, manner of levy, or character of said tax.

And the defendant demurs to the second count of the said complaint and for grounds of demurrer assign the following:

1. The same grounds heretofore assigned to the entire complaint
2. Because said act of the Legislature, complained of, is constitu
tional and valid.
3. Because said act of the Legislature is not in violation of Sectio
45 of Article IV or of any other provision of the Constitution of th
State of Alabama.
4. Because it appears from said complaint that the tax complaine
of was legally levied and assessed against plaintiff.

ALEX M. GARBER,
Attorney General.
SAML D. WEAKLEY,
H. C. SELHEIMER,
Attorneys for Defendant.

Filed in office Apr. 27, 1908.
63 JOHN S. GILLESPY,
Clerk & Register.

Refiled in office Nov. 17, 1908.
JOHN S. GILLESPY,
Clerk & Register.

Organization.

THE STATE OF ALABAMA,
Jefferson County:

Be it remembered that at a term of the City Court of Birmingham
begun and held for the County of Jefferson and the State of Ala
bama, in the City of Birmingham, on the First Monday in October
in the year of our Lord Nineteen Hundred and eight, and of th
Independence of the United States of America, the 133rd year
Present and presiding the Honorable Chas. A. Senn, Chas. W. Fer
guson, H. A. Sharpe and C. C. Nesmith, Judges of said Court; als
present John S. Gillespy, Clerk and Register of said Court, and E. L
Higdon, Sheriff of said County, the following proceedings were ha
and done, towit:

In the City Court of Birmingham, Alabama

SOUTHERN RAILWAY COMPANY, a Corporation under the Laws of th
State of Virginia, Plaintiff,
vs.
SAMUEL E. GREENE, Defendant.

Amendment to Complaint.

Comes the defendant and by leave of the Court first had and ob
tained files the following additional count to the complaint in th
above entitled action.

Count No. 3. The plaintiff, the Southern Railway Company,
corporation duly created by and organized under the laws of th

State of Virginia, claims of the defendant, Samuel E. Greene, the further sum of twenty-two thousand, four hundred and fifty-eight dollars and thirty-six cents ($22,458.36) for money on the 29th day of February, 1908 received by the defendant to the use of the plaintiff, which sum of money with interest thereon, is still unpaid, and is the property of the plaintiff. Said money was so received by the defendant as Judge of the Probate Court of Jefferson
61 County, from the plaintiff, the Southern Railway Company as a franchise tax, which the defendant demanded of the plaintiff under the provisions of an act of the Legislature of Alabama approved March 7th, 1907, (H. B. 611) entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in the State under the laws of the State of Alabama, to pay an annual franchise tax," which enactment is now embodied in Section 2391 and 2392 of the present Code.

Plaintiff avers that the said act is as to it invalid, unconstitutional and void, in that it denies to the plaintiff, a person within the jurisdiction of the State of Alabama, the equal protection of the law, contrary to the terms and effect of the Fourteenth Amendment of the Constitution of the United States, the benefit and protection of which provision of the Constitution of the United States, namely, Section 1 of the Fourteenth Amendment to the Constitution of the United States, the plaintiff specially claims and relies upon.

Plaintiff states that it is a corporation duly created by and organized under the laws of the State of Virginia, and especially under an Act of the General Assembly of Virginia, approved February 20, 1894, entitled "An Act authorizing the purchasers of the Richmond & Danville Railroad, their assigns and successors to become and be a corporation and to adopt a name therefor, and to possess and exercise general powers and authorizing the leasing to or by and the consolidation therewith of other corporations." Among other provisions of the said Act was one which granted power to the plaintiff from time to time, as a common carrier of passengers and freight to lease, use, operate, consolidate with or purchase or otherwise acquire any railroad or transportation company then or thereafter incorporated by the laws of the United States or any of the States thereof. Plaintiff states that it was duly organized under the said Act and acquired lines of railroad in Virginia, North Carolina, Tennessee, Georgia and other States. It began business with its said lines as a common carrier of freight and passengers on July 1, 1894,
65 and has ever since continued to carry on the same, such business being the acquiring, owning and operating of lines of railroad in various States, and conducting an inter-State and intra-state transportation of persons and property as a common carrier. It files herewith as part hereof a duly certified copy of its charter as Exhibit "A."

On July 16th, 1894, in pursuance of and in conformity with the laws of the State of Alabama, it filed in the office of the Secretary of State of said State of Alabama, a copy of its charter, and at the same time designated its principal place of business in said State and an agent upon whom process could be served and at the same time paid

to the Treasurer of the State of Alabama, the sum of two hundred and fifty ($250.00) Dollars, being a full payment of the fee required by the provisions of an Act to require all corporations to pay a fee or license for the use of the State before commencing business in this State, approved February 18, 1893. It files herewith as part hereof the receipt of the State Treasurer for said $250 and a certificate showing the filing of a copy of its charter and an instrument in writing designating J. M. Bridges, Selma, Alabama, as the agent of the plaintiff in this State, same being marked "Exhibit B."

Plaintiff states that as soon as it had complied as aforesaid with the laws of Alabama, it at once began carrying on in that State the business for which it was chartered, viz: acquiring, owning and operating railroads both for interstate and intra-state transportation of persons and property as a common carrier; and plaintiff states that it has ever since continued to and does now carry on such business in Alabama.

Plaintiff states that between the time that it thus complied with the laws of the State of Alabama and the year 1899 it purchased and acquired as permitted and authorized by the laws of Alabama and there were conveyed to it various lines of railroad (and the franchises under which they had been built and operated) connected with and continuous of other lines owned by plaintiff. These lines of railroad,
so far as they were and are situate in the State of Alabama,
65 had been theretofore constructed under its laws, by divers corporations either specially chartered by the Legislature of Alabama or organized under its general laws for the incorporation of railroad companies. The plaintiff states that to set forth the franchises of each of these companies would result in making this complaint greatly prolix. Plaintiff states that each of the said Alabama corporations had such powers as are described in the laws of Alabama in force in 1886 for the incorporation of railroad companies, as set forth in the laws of Alabama in 1886 and in the laws amendatory thereof.

These lines of railroad in Alabama so purchased and conveyed to the plaintiff are described as follows, viz:

A line of railroad called Akron Branch, running from Akron in Dallas County, through the counties of Dallas, Perry and Hale.

The Bloeton Branch, extending from Wilton in Bibb County, through Jefferson and Shelby Counties, to Mobile Junction, and from Gurnee Junction to Bloeton, through Shelby, Bibb and Jefferson Counties.

The Georgia Pacific, extending from the East Alabama State Line, near Muscadine, to the Western line of Alabama near Fernbank, through the counties of Cleburne, Calhoun, Talladega, St. Clair, Jefferson, Walker, Fayette, Lamar, Marion, Tuscaloosa, Pickens and Winston.

The Memphis Division, extending from a point near Stevenson, Jackson County, westerly to the Mississippi-Alabama line of Colbert County, through the counties of Jackson, Madison, Limestone, Morgan, Lawrence and Colbert, and a branch running from Tuscumbia to Florence.

Florence Division extending from Tuscumbia to Florence, gh the counties of Colbert and Lauderdale.

Meridian sub-division extending from Selma to York, through unties of Dallas, Perry, Hale, Marengo and Sumpter.

Mobile Junction cut-off, from Valley Creek branch to North ngham, all in Jefferson County.

Rome and Decatur, from the Alabama-Georgia line to Attalla gh the counties of Cherokee and Etowah.

The Selma sub-division, extending from the Georgia-Alabama Line through to Selma, Alabama, via Anniston through Cherokee, Colbert, Talladega, Shelby, Bibb, Chilton, ga and Dallas.

intiff states that it has continued to own and now owns the rty above described and has continued to operate and does now e the same as a common carrier for the purposes above de- l.

intiff further states that since such ownership began, it has nously been and now is a corporation within the State of Ala- over which, as a foreign railroad corporation, the State has ex- l the highest forms of jurisdiction as well as increasingly e control of its business and property, but that until the act ained of in this action, the State never discriminated against laintiff, as such foreign railroad corporation in favor of do- corporations, but pursuant to a well settled public policy, gave to this complainant, as such foreign railroad corporation, me protection of the law given to domestic railroad corpora-

Plaintiff calls attention in this connection to laws of 1891 458, approved Feb. 18th, 1891) page 1086 reading as fol-

it enacted by the General Assembly of Alabama, that in all in which all of the capital stock of a railroad company char- under the laws of the State of Alabama is owned by a railroad any, chartered by the laws of another State, it shall be lawful ch railroad company in this State to sell and convey to such d company owning its stock, all of its property, roadbed, rights ranchises; provided, that said company purchasing said rail- shall keep an office and an agent in the State of Alabama, and aid railroad so purchased shall be in all respects subject to the of Alabama as if owned by a domestic corporation; and pro- further, that all liens on such railroad, and the rights of cred- shall be preserved unimpaired."

s act was embodied in Section 1169 of the Code of 1896. Sec- 1169 was amended by laws of 1899 (S. B. 241, approved Feb. 7, 1899) page 28, reading as follows:

"Be it enacted by the General Assembly of Alabama, That section 1169 of the Code shall be, and the same is hereby ded so as to read as follows, viz: 1169. "Domestic may sell its rty and franchise to foreign corporation. Whenever all of the l stock of a railroad corporation chartered under the laws of tate is owned by a railroad corporation chartered by the laws other State, it shall be lawful for the domestic corporation to

sell and convey to the corporation owning its stock, all of its property, road bed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another State, owning or operating by lease or otherwise, any railroad in this State to purchase at judicial sale or otherwise or to lease and to hold and use in such railroad or to acquire, hold and use all or any part of the capital stock or of the property, road beds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either directly or by means of an intervening line, but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation and all liens and rights of creditors shall be preserved, unimpaired and any and all purchases and leases such as are authorized by this act, heretofore made are hereby legalized."

Said act of 1899 was amended by the laws of 1903 (S. B. 343, approved Oct. 2, 1903) at page 321, Sections 11 and 12, and as so amended, is embodied in Sections 3495 and 3498 of the present Code.

Plaintiff states that it acquired said lines, worth many millions of dollars, in pursuance of and in reliance upon the laws of the State of Alabama and the right given it to do so by said laws and its compliance with the requirements of said laws and the aforesaid public policy of giving it the same protection of the law as domestic railroad corporations; that it has since such acquisition continu-
69 ally operated the said lines of railroad, transacting a large amount of business thereon, both inter-state and intra-state, and both before and since the year 1899 has annually expended large sums of money in the maintenance of said lines and in the improvements and betterments thereon connected therewith and additions thereto—all in reliance as aforesaid.

Plaintiff states that besides paying the said admission fee of $250.00 like the domestic railroad corporation pays its charter fee upon its organization, it has since such ownership began paid from year to year the license taxes exacted of it as of other persons and corporations whether domestic or foreign, operating railroads in this State under Sections 3189 of the Code of Alabama of 1896, and of Section 1128 of the Code of Alabama of 1886 for defraying the expenses of the Railroad Commission of the State of Alabama; and has also paid from year to year the numerous license taxes exacted of it as of other persons and corporations operating railroads in this State by the various municipalities throughout the State in which it does business, amounting in all to a large sum annually; and has also paid the license fee and procured the license provided for in an Act of the Legislature of Alabama approved March 4th, 1907 (S. B. 86) entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations or corporations organized under and by authority of the law of any other State or government than the State of Alabama, and to fix a punish-

or the violation thereof." Which Act is now embodied in Sec-
351 to 3658 of the present Code. And it has also since such
hip began, paid numerous assessments exacted of it as of other
and corporations, whether foreign or domestic operating rail-
n the State, by the various municipalities through-out the
nto which its lines run, for improvements etc. amounting in
many hundreds of thousands of dollars. And it has also since
nership began, paid annually to the State, Counties and other
urisdictions of the State ad valorem taxes exacted of it as
of other persons and corporations, whether domestic or for-
eign; owning similar property in the State, amounting to a
very large sum each year, and this year there was exacted of it
other persons and corporations, whether domestic or foreign,
similar franchises, for the first time an ad valorem tax on
nchises exercised by it in connection with its said railroads
ting to twenty-four thousand seven hundred & twenty one
21,000) Dollars this having been done under *under* the laws of
H. B. 741 approved March 4th. 1907) p. 342 now embodied
ions 2361 *et seq* of the present Code.

tax complained of in this action is a very heavy tax upon the
ge of exercising these very same franchises last mentioned as
directly taxed so heavily and it, unlike the other taxes set
bove, save only that of ten dollars per annum for a permit to
iness in the State, is sought to be exacted from foreign corpora-
nly.

ntiff states that besides having, up to the time of this enact-
here complained of, received from the State protection equal
given domestic corporations in taxation and assessments, the
privileges, liabilities and burdens granted to or imposed upon
g with other foreign railroad corporations by the State have
been the same as those granted to or imposed upon domestic
l corporations, in the following, among other, respects: suing
ing sued in any County in the State in which it does business
at; holding property, real and personal, whether tangible or in-
le; including other railroads in the State and their franchises
Capital Stock or bonds of such other railroads; incurring debts
suing its own bonds; exercising the right of eminent domain
ht of way, etc.; being subject to the Legislature of the State of
na, the State Tax Commission and the State Board of Equaliza-
d the State Railroad Commission with all their regulative and
orial powers extending to the most vital parts of plaintiff's busi-
and plaintiff further calls attention to the fact that the penalty
of the Act complained of does not provide, in case of a viola-
tion of that Act, for ouster of the violator from the State, but
only for a cessation of intrastate business and a denial of the
use of the State Courts, leaving it in the State with all its
ties, subject to taxation, police regulation and legislative
l.

ntiff refers to Section 229 of the Constitution of Alabama,
ing in part as follows:
e Legislature shall, by general law, provide for the payment to

the State of Alabama of a franchise tax by corporations organized under the laws of this State which shall be in porportion to the amount of capital stock."

and to Section 232, providing in part as follows:

"The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State."

Plaintiff avers that no act was in force at the time these two provisions of the constitution were adopted that complied with either of them as to railroad corporations, either domestic or foreign—the Code of 1896, Section 1122, sub-section 55, as amended did not apply to railroad corporations, either domestic or foreign, as railroads, both domestic and foreign, paid a license tax under Section 1128 of the Code of 1886 and Section 3489 of the Code of 1896 to cover the expenses of the Railroad Commission of the State of Alabama until the Code of 1907 took effect. Plaintife also avers that until the act here complained of was enacted, the Legislature of the State made no attempt to comply as to railroad corporations, with either said Sections 229 or Section 232 of the Constitution— the Code of 1907, Section 2361, Sub-section 26, exacting an annual tax from domestic corporations upon their franchises to be corporations in proportion to their paid-up capital stock, which tax can not exceed $500.00 annually, no matter how much the capital stock, is not a compliance with the mandate of said Section 229 of the Constitution.

Plaintiff avers that the tax here complained of, imposed pursuant to said Section 232 of the Constitution, is a heavy annual tax sought to be exacted for the sole purpose of deriving additional revenue
72 from foreign railroad corporations, including this plaintiff; and plaintiff avers that no tax is or has been exacted of domestic railroad corporations as provided by said Section 229 of the Constitution; and plaintiff further avers that when said two sections of the Constitution are read together, as they should be, it is evident that the sovereign power of the State intended that this new tax should be exacted of foreign and domestic corporations alike, pursuant to the aforesaid policy of the State in that regard.

Plaintiff states that there are now and have been ever since the constitution of 1901 took effect and were at that time, many domestic corporations operating railroads in this State, and therefore corporations as to which said Section 229 of the Constitution is applicable, and that some of these were and are competitors of this plaintiff as common carriers of intrastate and interstate business and none of them are subject to any tax like that forming the subject matter of this action, exacted of this plaintiff under the act herein complained of. Plaintiff avers that this arbitrary discrimination by the Legislature of the State of Alabama against it in favor of domestic railroad corporations put plaintiff under a serious disadvantage, as compared with the said domestic railroad corporations, in prosecuting its business in this State, and denies to it the equal protection of the law guaranteed to it by section 1 of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff states that its principal place of business in Alabama is in Birmingham, Jefferson County, and there resides the agent upon whom plaintiff according to the terms of the law of Alabama has designated as the person upon whom process against it may be served.

The defendant is the Probate Judge of said Jefferson County, and it was demanded of the plaintiff, under said Act approved March 7, 1907 that it should make a return under the same. The plaintiff made such return, protesting at the same time that the said Act was invalid. A copy of its return as made is filed herewith as a part hereof marked Exhibit "C."

73 The said Probate Judge upon consideration of the said return made a finding that the actual amount of the capital of the plaintiff employed in the State of Alabama in the year 1907 was $14,903,246 basing the same upon the value of the railroads above described, as assessed for ad valorem taxes for the current year; and finding upon this computation that the tax due as provided in the Act (two-thirds of which belonged to the State and one-third to the County) was twenty-two thousand, four hundred and fifty-eight dollars and thirty-six cents ($22,458.36); and said Probate Judge thereupon demanded of the plaintiff forthwith payment of such sum, with the consequences following a delinquency denounced by the provisions of said Act. And plaintiff avers that under duress, because of the provisions of said law prohibiting the plaintiff from doing any business in the State of Alabama not constituting interstate commerce or to maintain and demand any action in any of the Courts of this State upon a contract made in this State, other than contracts based on interstate commerce, unless it should have paid said tax within sixty days after January 1st, 1908 and because of other penalties with which it was threatened for a failure to pay said taxes, it paid to the said defendant, on February 29th, 1908, the sum of twenty-two thousand four hundred and fifty-eight dollars and thirty-six cents ($22,458.36) accompanying said payment with a written protest against its exaction, and with a note to the defendant not to pay over said money or any part thereof to the authorities of the State of Alabama or the County of Jefferson; and with a notice that the plaintiff proposed, within thirty days from that date, to bring suit against the defendant for the recovery of said money. The said defendant acknowledged payment of the said sum and acknowledged same to have been paid by it under protest and under duress, and acknowledged the receipt of the notice warning him against paying over said money unless the plaintiff should fail for thirty days from the date thereof to bring suit to recover the same. Such protest and notice and such receipt of the defendant, are filed herewith as part hereof marked "Exhibit D."

74 And the said defendant now retains said sum and will retain the same until and subject to the final determination of this action and in compliance with said notice.

Plaintiff states that ever since the filing of its statement with the Secretary of State on July 16, 1894, as hereinbefore set forth, the plaintiff has been a person subject to the jurisdiction of the State of Alabama in the sense of Section 1 of the Fourteenth Amendment

to the Constitution of the United States and that the said State of Alabama has exercised jurisdiction over the plaintiff continuously ever since that date in respect to all of its property situated within and its business carried on in the state of Alabama.

WEATHERLY & STOKELY,
Attorneys for Plaintiff.

Filed in office Nov. 17, 1908.

JOHN S. GILLESPY,
Clerk & Register.

In the City Court of Birmingham, Alabama.

SOUTHERN RAILWAY COMPANY, a Corporation under the Laws of the State of Virginia, Plaintiff,

vs.

SAMUEL E. GREENE, Defendant.

Demurrer to Amended Complaint.

1. Comes the defendant and refiles to the first and second counts of the complaint as amended, the demurrer heretofore filed to the original complaint, and to each count thereof.

2. The defendant demurs to the third count of the complaint, as amended, and for grounds of demurrer, assigns the following:

(*a*) Separately and severally the several grounds of demurrer heretofore filed to the original complaint, and to each count thereof.

(*b*) The several grounds of demurrer assigned to the second count of the original complaint.

(*c*) Because the facts alleged in said third count do not
75 show that the plaintiff has ever been denied the equal protection of the law, by the levy and assessment of the tax complained of.

(*d*) Because it appears that the act of the Legislature of Alabama, approved March 5, 1907 is constitutional and valid and not void, and that the same has been enforced and applied to the plaintiff in a constitutional manner.

(*e*) Because it appears from the said count that the act of the Legislature of Alabama, approved March 5, 1907 does not contravene Section one of the Fourteenth Amendment to the Constitution of the United States.

(*f*) Because the said count shows no sufficient reason why plaintiff should recover of the defendant as it seeks to do in and by said count.

(*g*) Because no facts are stated in said count which authorize the recovery against the defendant which the plaintiff seeks in and by said count.

(*h*) Because the Court knows as a matter of law that the proper construction of Section 232 of the Constitution of Alabama, and of Section 229 of the Constitution of Alabama, does not require that

the tax provided for in those sections should be exacted of foreign and domestic corporations alike.

ALEX M. GARBER,
Attorney General of Alabama.
SAM'L D. WEAKLEY,
H. C. SELHEIMER,
Attorneys for Defendant.

Filed in office Nov. 17, 1908.

JOHN S. GILLESPY,
Clerk & Registee.

Minute Entry.

SOUTHERN RAILWAY COMPANY, a Corporation under the Laws of the State of Virginia, Plaintiff,
vs.
SAMUEL E. GREENE, Defendant.

Present and Presiding, C. C. Nesmith, Judge of Said Court.

On this the 17th day of November, 1908, came the plaintiff by its attorneys and by leave of the Court first had and obtained
76 amends its complaint herein as appears by a separate paper writing this day filed; the defendant refiles his demurrers heretofore filed to the complaint as amended, and to each count thereof and also files additional demurrers to the complaint as amended and to each count thereof, leave of the Court being first had and obtained; the demurrers to the complaint as amended are by the Court heard and considered. Whereupon,

It is ordered and adjudged by the Court that said demurrers be and they are hereby sustained; the plaintiff now declining to plead further.

It is ordered and adjudged by the Court that the plaintiff is not entitled to have and recover of the defendant in this behalf and that the defendant go hence without a day and have and recover of the plaintiff his costs in this behalf expended for which let execution issue.

Security for Costs of Appeal to Supreme Court.

THE STATE OF ALABAMA,
Jefferson County:

City Court of Birmingham.

No. 21566.

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
SAMUEL E. GREENE, Defendant.

Security for Costs.

We hereby acknowledge ourselves security for costs of appeal to Supreme Court in the above case, returnable to the present term thereof. And for the payment of the above bond, we hereby waive our right of exemption to personal property under the Constitution and Laws of the State of Alabama.

SOUTHERN RAILWAY CO., [L. S.]
By WEATHERLY & STOKELY,
Att'ys in Fact.
JAMES WEATHERLY. [L. S.]
J. T. STOKELY. [L. S.]

Taken and approved the 17 day of Nov. 1908.

JOHN S. GILLESPY,
Clerk & Register.

Filed in office this 17th day of Nov. 1908.

JOHN S. GILLESPY,
Clerk & Register.

77 City Court of Birmingham.

THE STATE OF ALABAMA,
Jefferson County:

Citation of Appeal.

To Samuel E. Greene or H. C. Selheimer, his Att'y, Greeting:

Whereas, on the 17th day of November, 1908, Southern Railway Company has taken an appeal from the judgment rendered by the City Court of Birmingham in and for said State and County on the 17 day of November, 1908 in the cause of Southern Railway Company against Samuel E. Greene.

Now, you are, therefore cited to appear before the Supreme Court

of Alabama, within the time prescribed by law to defend on said appeal, if you think proper so to do.

Witness this 17 day of November, 1908.

JOHN S. GILLESPY,
Clerk & Register.

To any Sheriff of said State to execute:

Executed this 18 day of Nov. 1908, by leaving a copy of the within Notice of Appeal with H. C. Selheimer, Att'y.

E. L. HIGDON, *Sheriff.*
By A. L. WILSON,
Deputy Sheriff.

Certificate.

THE STATE OF ALABAMA,
Jefferson County:

I, John S. Gillespy, Clerk and Register of the City Court of Birmingham, in and for said County and State do hereby certify that in the cause of Southern Railway Company *vs.* Samuel E. Greene which was tried and determined in this Court on the 17th day of November, 1908 an appeal was taken on the 17th day of November, 1908 by the plaintiff from the judgment rendered therein to the Supreme Court to be holden of and for said State and that the foregoing pages numbered from one (1) to sixty-five (65) inclusive, contains a full, true and correct copy or transcript of the record and proceedings in said cause (except such parts of the record as are required to be omitted from the transcript) and a copy of the Security for Costs
78 given therein and the Citation to the defendant of said Appeal.

Witness my hand and the seal of this Court this the 21st day of November A. D. 1908.

[SEAL.]

JOHN S. GILLESPY,
Clerk & Register.

THE SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
SAMUEL E. GREENE, Defendant.

Assignment of Errors.

The Appellant, Southern Railway Company, assigns the following as errors apparent upon the record, viz:

1. The Court erred in sustaining defendant's demurrer to the first count of the Complaint as amended.

2. The Court erred in sustaining defendant's demurrer to the second count of the Complaint as amended.

3. The Court erred in sustaining defendant's demurrer to the third count of the Complaint as amended.

ALEX P. HUMPHREY AND
WEATHERLY & STOKELY,
Attorneys for Appellant.

79 *Minutes Supreme Court of Alabama.*

November Term, 1908.

THURSDAY, *November* 26, 1908.

6 Div., 692.

SOUTHERN RAILWAY COMPANY
vs.
SAMUEL E. GREENE, as Judge, &c.

Appeal from Birmingham City Court.

Come the parties by attorneys, and submit this cause on briefs for decision.

Minutes Supreme Court of Alabama.

November Term, 1908.

THURSDAY, *February* 11, 1909.

6 Div., 692.

SOUTHERN RAILWAY COMPANY
vs.
SAMUEL E. GREENE.

Appeal from Birmingham City Court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs, and duly examined and understood by the Court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed. It is also considered that the Appellant and James Weatherly and J. T. Stokely, sureties on the appeal bond pay the costs of appeal of this Court and of the City Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let execution issue accordingly.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1908-9.

6 Div., 692.

SOUTHERN RAILWAY COMPANY
v.
SAMUEL E. GREENE.

Appeal from Birmingham City Court.

SIMPSON, *J:*

This suit was brought by the appellant, against the appellee as Probate Judge of Jefferson County, to recover $22,458.36 which had been paid to said probate judge under protest, on account of the franchise tax required by Act of 1907, p. 118, sections 2364-2367 of the Code of 1907.

The complaint alleges that the plaintiff is a corporation, organized under the laws of Virgina, specially authorized by said laws to acquire railroad properties in other states, by either purchase or consolidation, and to use the same in the business of transporting passengers and freight, as a common carrier; that it commenced business July 1st, 1894, and has continued in business ever since, having acquired various lines of railway in Virginia, North Carolina, Tennessee, Georgia, and other States; that it is and has been conducting both an interstate and intra-state business; that on July 16th, 1894, it filed in the office of the Secretary of State of Alabama a copy of its charter, and, at the same time, designated its principal place of business in said State, and an agent on whom process could be served, and paid to the Treasurer of the State of Alabama $250.00, being a full payment of the fee required by the provisions of an act to require all corporations to pay a fee or license, for the use of the State, before commencing business in this State, approved February 18th, 1893, and at once entered upon the business in said State for which it was chartered; also that it has paid the tax on franchise, or intangible property, required of all corporations by the Act of March 4th, 1907, section 2365 of Code of 1907; that between the time of commencing business and the year 1899, it purchased and acquired various lines of railroad in said State, connected with, and continuous of the other lines owned by it (which are described in the complaint); that it paid large sums of money for said lines, in reliance upon the then laws of Alabama, and has, since, continuously operated said lines, transacting a large amount of business, interstate and intra-state, and has expended large sums in maintaining the same and in improvements and betterments; that it has, from year to year, paid all property taxes and license taxes required by law, including the license fee of ten dollars, by the Act of March 4th, 1907, required of foreign corporations only; that the tax required by the Act of March 7th, 1907, now complained of, is

exacted of foreign corporations only; that the lines operated and owned by the plaintiff, in Alabama, were made the basis, in ascertaining the amount of said franchise tax due by plaintiff.

The complaint was demurred to, the demurrers were sustained, and judgment was rendered for the defendant.

In order to determine the issues involved in this case, it is necessary, first, to ascertain the nature of the tax complained of, and, specially, whether or not it is a tax on property—counsel, in argument, placing some emphasis on this point.

A franchise is a special privilege conferred by the government on individuals.—*Bank of Augusta v. Earle*, 13 Pet. 519; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. 38.

In an early case, the Supreme Court of the United States said:

"A franchise is property, and nothing more; it is incorporeal
82 property, and is so defined by Justice Blackstone. * * *
It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment."—*West Bridge Co. v. Dix*, 6 Howard 793, 797-8.

In another case, before the same court, in which it was held that a statute exempting all the property of a railroad corporation from taxation included the franchise, it was said: "Nothing is better settled than that the franchise of a private corporation—which, in its application to a railroad is the privilege of running it and taking fare and freight—a property, and of the most valuable kind, as it cannot be taken, for public use even, without compensation. It is true it is not the same sort of property as the rolling stock, roadbed, and depot grounds, but it is equally, with them, covered by the general term, 'the property of the company.'"—*Wilmington R. R. Co. v. Reid, Sh'ff*, 13 Wall. 264, 268.

The case just cited is quoted and reaffirmed in *Gulf & Ship Island R. Co. v. Hewes*, 183 U. S. 67, 77.

The case of *"The State v. Stonewall Ins. Co."* (89 Ala. 335) held merely that a tax on the "capital stock" of a corporation was a tax on property, and the court said: "Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether a tax is on the property, or the franchises, may be regarded generally uncertain and unsatisfactory. * * * The usual and most certain test is, whether the tax is upon the capital stock *eo nomine*, without regard to its value, or at its assessed valuation, in whatever it may be invested; if the former, it is a franchise tax; if the latter, a tax upon property" (p. 338).

In the case of *Phœnix Assurance Co. v. Fire Department of Montgomery* (117 Ala. 631), the act in question required all insurance companies, domestic and foreign, to pay two hundred dollars before taking any premium against fire, etc., and this court considered it a "privilege or occupation tax," the court saying: "Moreover it is well settled that limitations have relation to the taxation of property
only—property which must be assessed according to its
83 value—and not to other subjects of taxation, such as privileges and occupations" (p. 646). Treating it as a privilege

ax, it was upheld, the court saying: "The rule of uniformity does not require that all subjects be taxed or not be taxed alike; the requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind" (p. 653).

In the case of *Phœnix Carpet Co. v. State* (118 Ala. 113), the tax complained of was distinctly a privilege tax, levied only on those corporations not otherwise specifically required to pay a license tax, whether domestic or foreign. The validity of the tax was questioned by a domestic corporation, on the ground that it violated the uniformity provisions of our Constitution—1st, because such privilege tax was not required of individuals doing a like business; and, 2nd, because it was not required of all corporations.

The tax was held to be valid, the court saying, it "has the properties and quality of a franchise tax—it is measured or graduated by the amount of the paid-up capital stock of the corporation, and this distinguishes it from a tax on property" (p. 151).

It will be observed that these cases refer to privilege or occupation taxes, which, as stated, are "annexed to the franchises, as a royalty for the grant;" and it is stated that "the tax may be imposed on the creation of the corporation, but if the charter or grant of incorporation does not expressly exempt it from taxation, a tax on the franchise may be subsequently imposed at the will of the legislature," provided the equality and uniformity is observed which "consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed; and if it be a franchise tax upon all corporations belonging to the class upon which it is imposed" (pp. 151-2).

It was said in argument that the tax on a corporate franchise is a tax on the right to be a corporation, but that is not correct, for the right to be a corporation is a right or franchise that belongs to the individuals who compose the corporation, and not to the corporation itself. The franchises of the corporation are the rights to engage in and carry on the business for which it was chartered.

Fictsam, Assignee, v. Hay, 13 N. E. 501, 502; *Cedar Rapids*
84 *Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083; *Memphis & L. R. Co. v. Commissioners*, 112 U. S. 609, 619.

There are so many conflicting authorities, that it is a matter of considerable difficulty to know just where to draw the line between a franchise as an asset of the corporation, and a franchise tax as synonymous with a license or privilege tax.

In a case in New York, where a tax was imposed on "the corporate franchise or business" of all corporations, and it was sought to be imposed upon a Pennsylvania corporation which had no property in New York, but had terminal facilities, such as wharves, piers, and docks, for receiving passengers and freight to be carried to its railroad in New Jersey, and an office for issuing tickets, etc., the Court of Appeals held that the law was not violative of the interstate commerce law, because the tax was not on the property, but on the "corporate franchise or business, by the express language of the enactment," and said: "The tax when imposed upon a domestic corporation, is a tax on its corporate franchise; when imposed on

a foreign corporation is a tax on its business, a distinction based on the fact that corporate franchises are only taxable within the jurisdiction which creates them and where alone they can be said to have a *situs*." *People ex rel. Penna. R. Co. v. Wample*, 19 L. R. A. 694, 696-7.

In another case in which it was held that a tax on the "capital stock" of a corporation did not mean the shares of stock in the hands of the shareholders, but the capital owned by the corporation, the court said: "The franchise of the company which may be deemed its business opportunity and capacity, is the property of the corporation;" also, "that the property of every company may consist of three separate and distinct things which are its capital stock, its surplus, its franchises." *People ex rel. U. T. Co. v. Coleman et al.*, 126 N. Y. 433, 437, 438.

In another case, in which the Supreme Court of the United States affirmed the New York Court of Appeals in holding that this franchise tax was not a tax on the capital stock, and not invalid, in so far as bonds of the United States constituted a part of that stock, the court holds that the term "corporate franchise or business," means "the right or privilege given by the State to two or
85 more person of being a corporation, that is of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise;" also that the tax is not a tax on the capital stock or property of the company, but upon its corporate franchise." *Home Ins. Co. v. New York*, 134 U. S., 594, 599, 606.

It will be observed that the question at issue in the cases was not whether the corporate franchise is property, but whether it is identical with the tangible property which it represents. So really these decisions do not throw much light on the question as to whether the franchise of a corporation is, in and of itself, property.

In a late case, in which the Supreme Court of the United States held that certain provisions of the charter of a corporation did not prevent the State from levying a franchise tax, the court says: "The tax in question is a property tax, and the effect of the decision is to uphold a valuation of the whole property as a going concern." *Honolulu T. Co. v. Wilder*, 211 U. S. 137, 142.

Joyce, in his recent work on Franchises, draws the distinction between a franchise to *be*, and a franchise to *do*; but holds that both go with it wherever it goes as a corporation. He also speaks of them as "intangible properties."—Joyce on Franchises, § 39. He also speaks of the various names given in different States to charges imposed upon the franchise right of corporations to carry on their business within the State, and notes the conflicts; but states that, by whatever name called, the State has the power to impose conditions on foreign corporations, within certain limits, for doing business in the State.—Joyce on Franchises, § 356.

Mr. Gray, in his work on Limitations of Taxing Power, states that the franchise *to be*, and the franchise *to do*, may be taxed either as property or "by way of privilege, excise, or license taxation" (p. 34, § 47*a*). He seems to think that the law is in such a state of

haos, that, in many cases, it may be decided either way (pp. 38-9). He suggests a solution, to the effect that, when used as a noun, the word *franchise* indicates property, but when used as an adjective in the expression, "franchise tax," it indicates a privilege tax, and he says: "Where a tax is imposed in the shape of an annual charge or excise upon the right to *continued* corporate existence that also is not a property tax, but a privilege or license tax (pp. 40-41, §§ 53, 54, 55). After citing a number of cases, his summary is—

"A tax on an occupation or business act generally, which might be carried on either by a corporation or by an individual, is a simple privilege tax etc.

"A specific tax on a domestic corporation, or one measured by the amount of earnings or dividends, or business done, is generally a privilege tax, and the privileges or franchises thus taxed may be both a privilege of continued corporate existence, and the privilege of doing business for which the corporation is organized, or either.

"A specific tax on a foreign corporation, measured by the amount of business done, or by the amount of receipts or earnings or dividends, is generally a tax on the privilege of doing business in the State. A tax on a domestic or foreign corporation which involves valuation of property, by reference to the amount of capital stock, and an assessment upon such valuation, is generally a property tax, etc." (p. 53, § 67).

The conclusion is that, while a corporate franchise is property and a valuable asset of the corporation, yet the term *franchise tax* may be used to indicate a license or privilege tax—in other words, a tax imposed by the State for the continued privilege of exercising the franchise in the State.

In order to ascertain the meaning which the legislature attached to the word, and the intent of the law, it becomes necessary to examine the several laws on the subject.

Section 2364 of the Code of 1907 provides that "There shall be subject to taxation, in this State, the franchises, or intangible property, and assets of each and every corporation, whether organized under the laws of this State or of any other State or government, etc."

Section 2365 provides for the same rate of taxation on this intangible property as on the tangible property, and the succeeding sections provide for reports and statements, upon which the value of such intangible property may be determined.

Section 2391 provides that "Every foreign corporation, authorized to do business in this State (with certain exceptions) shall pay annually to a judge of probate of a county in which it has a resident agent a franchise tax for the use of the State, and for the amounts specified in the next succeeding section."

The succeeding section classifies them according to the amount of capital employed in the State, to-wit, on a corporation having capital employed in this State of $100.00 or less, twenty-five per cent.; on those whose capital so employed exceeds $100.00 but does not exceed $1,000.00, twenty-five per cent. on the first $100.00, and five per cent. on the remainder, etc.

In accordance with the principles before adverted to, we are of opinion that the intention of this act was not to levy an assessment on the franchises as property but to add to the license tax already required an additional privilege tax for the continued exercise of the corporate franchises in the State.—*Spira et al. v. State*, 146 Ala. 177, 178.

The complaint shows that the appellant corporation paid the license fee required by law, when it complied with the other conditions necessary to do business as a corporation in this State, and also the annual license tax required by law. The payment of these fees conferred upon the individuals the right to be a corporation in Alabama, and upon the corporation the franchise to engage in the business for which it was organized, with the rights thereto appurtenant, though it is not denied that the State may afterwards add a tax on the franchise, "as a royalty to the grant," in accordance with our decisions before cited. That royalty may be added in the shape of a tax on the franchise, as a valuable asset of the corporation, unless prohibited by some clause of the Constitution, or in the shape of a privilege tax for the continued exercise of its franchise.

So the question arises, can the State, after a foreign corporation has complied with previous laws, so as to be licensed to do business in the State as a corporation, has paid all annual licenses re-
88 quired, and has paid all taxes on property, required of corporations, including a franchise tax, still require it to pay a large additional amount as a franchise tax, which is levied on foreign corporations alone?

The statement of this proposition would furnish its own answer, if the question arose between two individuals, residents of the State. The next inquiry therefore is, whether there is anything in the nature, position and standing of a foreign corporation which makes such a discrimination valid.

It is familiar law that a State may allow a foreign corporation to transact business, within its limits, on such terms as it may please, or may exclude it entirely. The license, in the absence of special terms, is a mere revocable one, which may be recalled or burdened with additional restrictions provided the Constitution of the United States is not violated.—*Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, and cases cited; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 620; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 249.

Under the foregoing, and other authorities, the law in question is not violative of the clause in our constitution, nor of that in the United States Constitution, in regard to the impairing of the obligations of a contract, unless there are some special features connected with the granting of license to this corporation, which differentiate it from the ordinary case of a license granted to a corporation.

Section 1169 of the Code of 1896, under which the purchases in this case were made, provides that "such railroad so purchased shall be, in all respects, subject to the laws of this State, as if

wned by a domestic corporation, and all liens and rights of creditors shall be preserved."

A statute of Colorado, prescribing certain conditions necessary for a foreign corporation to enter the State, concluded with these words: "and such corporation shall be subjected to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character, organized under the general laws of this State, and shall have no other or greater powers."

After the corporation in question had complied with the provisions of the then law, and had invested a considerable amount in its business in said State, the legislature passed an act, placing upon domestic corporations a tax of two cents upon each thousand dollars of capital stock, and upon foreign corporations a tax of four cents on each thousand dollars of capital stock.

The Supreme Court of the United States held this act to be violative of the constitutional clause prohibiting any law impairing the obligation of a contract, the court saying: "These provisions of law, existing when the corporation applied for leave to enter the State, made the payment, required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were, or thereafter might be, imposed upon domestic corporations of like character." The court also says: "Nor is this a case where the power given by the state constitution to the general assembly, to alter, amend or annul a charter, is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation, which, up to the time of its enactment, had been imposed on all foreign corporations doing business in the State."—*American Smelting Co. v. Colorado*, 204 U. S. 103, 112-13-14-15.

In a previous decision of that high court, written by the same justice, it was held that a provision in the California Water Act of 1862, prohibiting county boards from reducing water rates below a certain point, did not create, with corporations thereafter incorporated, a contract which the State was bound by in subsequent legislation, and that the State could reduce the rates below that point without violating the contract clause of the Constitution. A number of cases are reviewed and analyzed in the opinion, and while the court holds that this power to amend is not without limit, even when reserved in the constitution of the state, and that sheer oppression and wrong could not be inflicted, under the guise of amendment or alteration, yet "a mere reduction of rates, while still leaving reasonable and fair compensation for the use of the property, is not prohibited."—*Stanislaus Co. v. San Joaquin C. & I. Co.*, 192 U. S. 201, 213. See also *Wisconsin etc. R. Co. v. Powers*, 191 U. S. 379, 383-386-7.

It will be noticed that, in the Smelting Company case, the provision defining the status of the corporation, was in the act providing for the entry of the corporation into the state, so that, when the corporation complied with the terms, paid the entrance fee, and

received its certificate, the contract was formed; while, in the case now under consideration, there were no such provisions in the statute under which the corporation entered the State, but only in the statute which authorized it to purchase the property of domestic corporations, and the claim of the appellant is that the general law of the State is incorporated into the contract between it and the selling corporation. It will be noticed also that section 1169 of the Code of 1896 does not say anything about what shall be the status or rights of the purchasing corporation, but only that "such railroad so purchased shall be in all respects subject to the laws of the State, etc."—

Section 23 of Article I of the Constitution of 1875 prohibited the State from making any "irrevocable grants of special privileges or immunities," and this was as much a part of the contract of purchase of the railroad property as was section 1169 of the Code of 1896.

We hold, then, that the act complained of is not violative of said section of the Constitution of 1875, nor of section 10 of Article I of the Constitution of the United States.

The only effect of the act complained of, is to recall or revoke so much of the privilege granted, as authorized the foreign corporation to do an intra-state business. The corporation remains the same, and the railroad the same, and the pleadings in this case do not raise any issue as to the result of the tax's working "oppression and wrong."

The fact that section 212 of the Constitution places certain duties on railroad companies, has no bearing on this question, for, if the State itself prohibits the corporation from doing intra-state business, it could not be subjected to liability for not doing it.

91 The Act does not interfere with the interstate business of the railroad company, and there is nothing in the pleading to raise the question that the enforcement of the statute would interfere with the interstate business. Therefore the Act is not invalid on that account.—*Osborne v. Florida*, 164 U. S. 650.

The next instance of the appellant is that the act complained of is violative of that provision of the Fourteenth Amendment to the Constitution of the United States which provides that "No state shall * * * deny to any person, within its jurisdiction, the equal protection of the laws."

It is settled by the decisions of the Supreme Court of the United States that, while a corporation is not a "citizen," within the meaning of that instrument, yet it is a "person," within its terms.

There cannot be any controversy as to the point that a corporation of another state, which has complied with the laws of this state, so that process can be served upon it, and paid the fees required for the privilege of doing business in this State, and also purchased property in the State and entered upon the transaction of the business authorized, is "within" the "jurisdiction" of the State.—*Blake v. McClung*, 172 U. S. 239. In fact, the claim of the State to impose a tax on the corporation, carries with it an admission that it is within the jurisdiction of the State.

In a case where a state board of equalization assessed the franchise and other property of a corporation, at a different rate and by

different methods, so as to result in "an enormous disparity and discrimination between the various assessments on corporations," it was held to be a violation of the Fourteenth Amendment.—*Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37-8.

An act regulating the charges in stock yards of certain size, was held to be violative of the Fourteenth Amendment, because there was only one stock yard of that size in the state, the court saying: "While recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protec-
92 tion is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast on the other.—*Cattig v. Kansas City etc. Co. & Kansas*, 183 U. S. 79.

In another case deciding that the State has a right to fix conditions upon which a corporation may do business in the State, and holding that a corporation is not a citizen, the court says that the object of the Fourteenth Amendment is "to prevent any person or class of persons from being singled out, as a special subject of discrimination and hostile legislation. Under the designation of *person* there is no doubt that a private corporation is included. * * * The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations, within the jurisdiction of the State."—*Pembina M. Co. v. Pennsylvania*, 125 U. S. 181, 188-9.

In another case, while sustaining the right of the State, as a purely police regulation to prohibit laundry work in certain localities, the court, commenting on the Fourteenth Amendment, said, among other things, that it requires "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others, under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."—*Barrier v. Connally*, 113 U. S. 27, 31; *Bell's Gap R. Co. v. Penna.*, 134 U. S. 238; Gray's Limitations of Taxing Power, §§1114-1115.

The Supreme Court of Kentucky, while holding that a corporation is not a "citizen", and may have imposed upon it such conditions as the state may choose to require, yet said, "If any state * * * should allow a corporation of another State to transact business as a corporation within its limits, and to acquire property there, the rights and property thus legally acquired, being held by the corporators, may be entitled to the same protection, under this clause of the Constitution, as if held by the corporators themselves."—Commonwealth v. Milton (12 B. Mon. 212); 54 Am. Dec. 522, 529-30.

On the other hand, the Supreme Court of Iowa sustains the
93 right of a state to impose a higher tax on foreign corporations than is imposed on domestic corporations, basing its conclusions partly on the general principle that the state has absolute power over foreign corporations, and partly on a misunderstanding to the effect that, in the *Pembina Case* (125 U. S. 180), the Supreme Court

of the United States had held that a corporation is not a "person," when in fact the decision in that case is that although a corporation is not a "citizen," it is a "person" (op. 189).—*Scottish etc. Ins. Co. v. Herriott* (109 Iowa, 606) 77 Am. St., 548, 555.

The case of *Paul v. Virginia* (8 Wall. 168), which is frequently referred to in the decisions, came up on an application for a license, and was based on the principle that a corporation is not a citizen.

The Supreme Court of Illinois held that the state may rightfully discriminate against a foreign insurance company, in levying taxes (*Ducat v. City of Chicago*, 48 Ill. 172), and that decision was affirmed by the Supreme Court of the United States Ducat *v.* Chicago, 10 Wall. 410. It is true that this decision rests upon other provisions of the United States Constitution relating to "citizens," and no mention is made of the Fourteenth Amendment, yet said Fourteenth Amendment was then in force.

The Supreme Court of California held that, after a foreign corporation was permitted to do business in that state, the state could not impose upon it conditions not imposed upon citizens, under the uniformity clause of the California statute.—*San Francisco v. Liverpool etc. Ins. Co.* (74 Cal. 113) 5 Am. St. Rep. 425.

The annotator in Cyc., referring to this case, says, "However this may be it is clear that it violates no principle of the Federal Constitution, as the Supreme Court of California seems to suppose." 19 Cyc. 1228.

Upon the whole, while we are free to confess that this point makes a deep impression on our minds, yet this is a matter which should be passed upon by the Supreme Court of the United States, and we hold that the decisions are not so clear as to authorize this court to declare the act in question violative of the Fourteenth Amendment to the Constitution of the United States.

94 The second section of the Act (1907, p. 421) is not violative of section 45 of the Constitution of 1901. The title of the Act is sufficient to cover the levy for the county purposes, the same being referrible and cognate to the general subject of providing revenue for the state. If there were no mention of the counties the commissioners' court of each county could levy a tax for such county.—Code, 1907, § 2155.

The judgment of the court is affirmed.

Bowdell, Denson, McClellan, and Mayfield, JJ., concur.

Anderson J., dissents.

(Over.)

95 ANDERSON, *J.* (Dissenting)

I agree with my brethren upon the proposition that all doubts should be resolved in favor of the validity of the act assailed, when the assailant has the right of appeal to the Supreme Court of the United States, and that the State's right to do so is questionable. I do not think, however, that the infirmity of the act in question is open to serious doubt; and notwithstanding the high regard I have for the opinion of my associates, the infirmity of the act is to me so

glaring that I deem it my imperative duty to construe the law as I understand it—regardless of consequences or whether the State has, or has not, the right of appeal.

Pretermitting the other questions insisted upon by appellants, against the validity of the Act in question, I am of the opinion, that it is violative of the Fourteenth Amendment to the Federal Constitution, in that the classification attempted is so unreasonable and unjust as to amount to a discrimination against one and in favor of other members of the same class. The classification has no reference to the subject or business but is based solely on the residence of the corporation. There can be no doubt, that the states have the right to require certain things of foreign corporations as a condition precedent to doing business therein, but when they enter the state, upon its invitation, and after complying with its requirements, they are entitled to the equal protection of the law and which includes a guaranteed uniformity in taxation. To my mind equal protection is not accorded when one railroad is taxed thousands of dollars more than others of equal value and similarly situated, the only distinction being that one is a foreign and the other a domestic corporation, notwithstanding the tax may be designated as a franchise tax in order to avoid the influence of the State Constitution against unequal taxation on property. That the state may levy a reasonable franchise tax on corporations there can be no doubt, but it has no right to levy such a tax on one and relieve another engaged in the same identical business, simply because one is foreign and the other is domestic. The right of the state to prescribe conditions
96 upon which a foreign corporation should enter refers to the tax imposed for the privilege of acting in a corporate capacity in the state. "It does not mean that, after the corporation has been admitted into the state and paid the charge exacted for admission, it is not entitled to due process of law or the equal benefit of the laws, under the Federal Constitution, or equality and uniformity under the state government. The situation is therefore analogous to that of a domestic corporation. The state may impose such exaction as it pleases as a condition for granting the corporate franchise, but when the corporation is organized, its property is to be taxed as other property, subject to such classification and qualification as may lawfully be made."—Judson on Taxation, §168.

It may be that the state has the right to prevent the doing of intrastate business by a non-submitting corporation, and which is the penalty prescribed by the statute; but it must be borne in mind that we are dealing with the state's right to collect and retain this illegal tax and not with its right or recourse against the plaintiff for resisting the right to collect and retain said tax.

The question before us is, was the tax lawfully levied? If it was, the plaintiff cannot recover, if not legal it can recover it back. What the state can and will do for a refusal to submit we are not called upon to decide, "sufficient unto the day is the evil thereof," as we are dealing with the right to levy and collect and not the penalty for a refusal to submit. Should the state attempt to deprive many of her citizens dependent solely on foreign corporations for a means of travel and transportation, because said corporations do not submit

to an unjust discrimination, will, of course, work a hardship upon many of her inhabitants and deprive them of the advantages and conveniences of the present age of progress and enterprise, and which cannot be taken from their more fortunate neighbors situated on domestic lines, and would create a condition to be deplored. But this threatened and impracticable disaster should not deter courts from condemning all laws of an unjust and discriminatory character such as the one in question.

97 I regret my inability to concur in the conclusion of my brothers and am constrained to voice my protest against this statute as it involves not only a year's taxation but a principle so far reaching and important as to not only affect the integrity of the State but threatens the sacred rights secured by our Federal Constitution. Citation of authority is not required to demonstrate the inequality of this law and that the classification therein attempted is unreasonable and unjust. Nor do I feel it necessary to comment on many of those mentioned in the opinion but will content myself with a short discussion of what seems to be the three leading cases relied upon as supporting the conclusion of the majority.

The case of *Ducat v. Chicago*, 10 Wall. 410, does not apply to the present question. There the Fourteenth Amendment was not considered, and while the case may have been decided subsequent to the adoption of same, the statute considered was enacted prior to the amendment and the alleged violation of same was anterior to said amendment.

The cases of *New York v. Roberts*, 171 U. S. 658 and *Horn Silver Mining Co. v. New York*, 143 U. S. 305, do not support the law in question. The statutes there considered, dealt with foreign and domestic corporations in the same manner. Indeed, the opinion in each case is guarded on this point and stresses the fact, that there was no discrimination against foreign corporations, simply because they were foreign instead of domestic. In the *Horn Silver Mining Co., case, supra*, the court, speaking through Justice Field says: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation." And in the *Roberts case, supra*, we find the following guarded expression: "It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax, but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the State." It is therefore inferable that the statute would have been condemned had it discriminated against foreign corporations of the same class as the domestic ones and which is done by the law in question.

I dissent from the conclusion of the majority and think this tax was illegal and the plaintiff should recover it back.

98 & 99 THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama.

6 Div., No. 692.

SOUTHERN RAILWAY COMPANY, Appellant,
v.
SAMUEL E. GREENE, Appellee.

From Birmingham City Court.

THE STATE OF ALABAMA,
City and County of Montgomery:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages numbered from one to ninety-seven inclusive, together with pages therein numbered 24A and 24B contain a full, true, and correct copy of the record and proceedings of said Supreme Court, together with a copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, this the 16th day of April, 1909.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

100 Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
v.
SAMUEL E. GREENE, Defendant in Error.

Writ of Error to the Supreme Court of Alabama.

Assignments of Error.

The Plaintiff in Error, the Southern Railway Company, by Alexander Pope Humphrey, Alfred P. Thom and James Weatherly their Attorneys, this May 3d, 1909, show that in the record of proceedings in the above entitled cause there is manifest error, in this, to-wit:

1. The said Supreme Court of Alabama erred in failing to hold that the Act of the Legislature of Alabama, approved March 7, 1907, entitled An Act to provide for revenue of this State by requiring all foreign corporations authorized to do business in this State under the laws of Alabama to pay an annual franchise tax, was void, because violative of Section 10 of Article I of the Constitution of the United States.

2. The Court erred in failing to hold the said Act void as violative of the Fourteenth Amendment of the Constitution of the United States, in that it denies to the Plaintiff in Error the equal protection of the laws and deprives it of its property without due process of law.

3. The Court erred in failing to reverse the judgment of the City Court of Birmingham with directions to enter a judgment in favor of the Plaintiff in Error against the Defendant in Error in the amount sued for.

101 4. The Court erred in other respects.

Wherefore the Plaintiff in Error prays that the judgment of the Supreme Court of Alabama may be reversed by this Honorable Court and this cause remanded to the said Supreme Court of Alabama with directions to send down its mandate to the City Court of Birmingham, directing it to overrule the demurrer of said Samuel E. Greene and proceed according to law.

ALEXANDER POPE HUMPHREY,
ALFRED P. THOM,
JAMES WEATHERLY,
Counsel for Plaintiff in Error.

Filed in office this 3rd day of May, 1909.
ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of Alabama, Greeting:

Because in the record of proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Alabama, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Southern Railway Company, Plaintiff in Error, and Samuel E. Greene, Defendant in Error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Alabama on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such validity and manifest error hath happened, to the great damage of said Southern Railway Company, Plaintiff in Error, as by their complaint appears we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to

102 the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 16th day of May, 1909, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 3rd day of May A. D. 1909, and of the Independence of the United States of America the 134th year.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. Ala.

Allowed by

J. R. DOWDELL,
Chief Justice, Supreme Court of Alabama.

Filed in office this 3rd day of May, 1909.

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

103 Copy.

Supreme Court of Alabama.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
SAMUEL E. GREENE, Defendant in Error.

Bond.

Know all men by these presents, that we the Southern Railway Company, as Principal, and The United States Fidelity & Guaranty Company, as Surety, are held and firmly bound unto Samuel E. Greene in the sum of One Thousand ($1000) Dollars, for the payment of which well and truly to be made, we the Southern Railway Company, Principal, and the said The United States Fidelity & Guaranty Co., surety, bind ourselves jointly and severally, firmly by these presents.

Witness our hands and seals this 3rd day of May, 1909.

The condition of this obligation is such that, whereas the said Southern Railway Company instituted a certain action against Samuel E. Greene, claiming a certain sum of money and its complaint was dismissed by the City Court of Birmingham, and, subsequently, an appeal was taken from said judgment to the Supreme Court of Alabama which affirmed the same, and, whereas, the said Southern Railway Company has sued out a Writ of error from the Supreme Court of the United States to reverse said judgment of the Supreme Court of Alabama.

Now, therefore, if the above bounden Southern Railway Company shall prosecute said writ of error to effect and answer all damage and

costs if it fail to make good this appeal, then this obligation shall be void, otherwise remain in full force and effect.

SOUTHERN RAILWAY COMPANY,
By WEATHERLY & STOKELY, *Att'ys.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
By LOUIS V. CLARK, *Attorney in Fact.*
H. M. ARCHIBALD, *Attorney in Fact.*

The above and foregoing bond is approved this May 3rd, 1909.
J. R. DOWDELL,
Chief Justice Supreme Court of Alabama.

Filed in office this 3rd day of May, 1909.
ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

104 UNITED STATES OF AMERICA, *ss:*

To Samuel E. Greene, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington thirty (30) days after the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Alabama, wherein the Southern Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the Plaintiff in Error, as in the said writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf. Witness the Honorable James R. Dowdell, Chief Justice of the Supreme Court of Alabama, this the 3rd day of May, A. D., 1909.
J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

Citation accepted for Defendant in Error this May 3rd, 1909.
ALEX. M. GARBER,
Counsel for Defendant in Error.

Filed in office this 3rd day of May, 1909.
ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

105 THE STATE OF ALABAMA,
Montgomery County:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, certify that the foregoing 102 pages contain a true, full and complete transcript of the record and proceedings had in the case of Southern Railway Company, Appellant *vs.* Samuel E. Greene, Appellee, upon appeal from a judgment of the Birmingham City Court, together with the original Writ of Error, the Original Assignment of Errors, the original Citation and proof of service and copy of the Writ of

Error Bond as the same appear from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at the Capitol at Montgomery, this the third day of May, A. D. 1909.

[Seal Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk Supreme Court of Alabama.

Endorsed on cover: File No. 21,662. Alabama Supreme Court. Term No. 450. Southern Railway Company, plaintiff in error, *vs.* Samuel E. Greene. Filed May 10th, 1909. File No. 21,662.

13

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 451.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. GASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MAY 11, 1909.

(21,663.)

(21,663.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 451.

UISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. GASTON.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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Record in

LOUISVILLE & NASHVILLE RAILROAD COMPANY

versus

JOHN B. GASTON.

Appeal from City Court of Montgomery.

In Error to the Supreme Court of the State of Alabama.

Organization of Court, October, 1907.

E STATE OF ALABAMA,
Montgomery County:

Be it remembered that at a term of the City Court of Montgomery, un and holden for said county at the Court House in the City Montgomery, State and County aforesaid, on the first Monday October in the year of our Lord one thousand nine hundred and en, it being the 7th day of said month.
Present: The Honorable A. D. Sayre, Judge Presiding, the follow- proceedings were had and the following judgments were ren- ed, to-wit:

Summons and Complaint.

E STATE OF ALABAMA,
Montgomery County:

any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon John B. Gaston, to appear ore the City Court of Montgomery, in and for said County, at place of holding the same, within thirty days from the service his summons and complaint, then and there to demur or plead he complaint of the Louisville & Nashville Railroad Company.
And you are hereby commanded to execute this process instanter l make return as required by law.
Witness my hand this twenty-seventh day of March, A. D., 1908.

H. N. HUGHES, *Clerk.*

2 *Complaint.*

In the City Court of Montgomery, October Term, 1907.

THE STATE OF ALABAMA,
Montgomery County:

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
JOHN B. GASTON.

First Count.

1st. The plaintiff claims of the defendant Seven Thousand Eight Hundred and Eighty-six and 60-100 ($7,886.60) Dollars for money on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, the Louisville & Nashville Railroad Company, which is a corporation organized and existing under an Act of the General Assembly of the State of Kentucky, approved March 5, 1850, and which has ever since July 1, 1872, been and is now duly authorized and empowered by the laws of the State of Alabama and its compliance therewith to do business in this State as a common carrier by railroad, which sum of money with interest thereon is still unpaid and is the property of the plaintiff. Said money was demanded by the defendant as the Judge of the Probate Court of Montgomery County of the plaintiff as a franchise tax alleged to be due by said Louisville & Nashville Railroad Company under the second section of an Act of the Legislature of Alabama approved March 7, 1907, known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," which said second section of said Act is unconstitutional and void in that the
3 General Assembly under the Constitution of Alabama had no power or authority to impose the tax therein mentioned for county purposes, and further, in that the tax therein provided for constitutes a subject not clearly expressed in the title of said Act, as required by section 45 of the Constitution of Alabama.

And the plaintiff further avers that said sum of Seven Thousand Eight Hundred and Eighty-six and 60-100 ($7,886.60) Dollars was a part of an aggregate sum of Twenty-three Thousand Six Hundred and Fifty-nine and 82-100 ($23,659.82) Dollars composed of Fifteen Thousand Seven Hundred and Seventy-three and 22-100 ($15,773.22) Dollars alleged by the defendant as Judge of the Probate of Montgomery County, Alabama, to be due under the first section of said Act as a franchise tax for the use of the State of Alabama, and the said sum of $7,886.60 alleged by the defendant as such Judge of Probate to be due by the plaintiff under the second section of said Act for the use of said County, and the plaintiff avers that the said Judge of Probate refused and would not receive the said sum of

$15,773.22 alleged by him to be due under said Act for the use of the State of Alabama without the payment to him of the said entire sum of $23,659.82 composed as aforesaid.

The plaintiff further avers that it was and is a foreign corporation within the meaning of said Act, and since July 1, 1872, authorized by the laws of the State of Alabama to do and doing an interstate and intrastate business as a common carrier railroad corporation in the State of Alabama and owned and operated in said business in said State many millions of dollars in value of railroads and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless.

And plaintiff avers that under duress, by reason of the penalties that it would incur by failure to pay said sum due for the use of the State of Alabama, and especially because said statute provides that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after "the same became due." Plaintiff paid said entire sum under protest and forthwith notified said defendant not to pay over said sum to the State of Alabama or to any other person, and that the plaintiff would sue him within a reasonable time to recover the same, and defendant still has said money. Copies of said notice and said protest are below set out in this complaint and designated as Exhibits "B" and "C" and are made parts of this count of this complaint.

Second Count.

2nd. Plaintiff claims of the defendant the further sum of $23,659.82 for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, the Louisville & Nashville Railroad Company, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. Said money was so received by the defendant as the Judge of Probate of Montgomery County, Alabama, from the plaintiff, the Louisville & Nashville Railroad Company, as a franchise tax which the defendant demanded of the plaintiff and alleged to be due by it under an Act of the Legislature, approved March 7, 1907, known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," which said Act of the Legislature the plaintiff avers is, as to the plaintiff, unconstitutional and void, being as it is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff, which is a person within the jurisdiction of the State of Alabama, of the equal protection of the laws.

5 Plaintiff avers that it is a foreign corporation within the meaning of said Act, having been duly incorporated and organized under an Act of the General Assembly of the State of Kentucky, approved March 5, 1850, by which, and the amendments thereto, enacted by said General Assembly March 6, 1878, and January 27, 1880, it was authorized and empowered to own, purchase, construct, lease, operate, control and maintain railroads in the State of Kentucky, Alabama and other States, and is and has been since July 1, 1872, under and by virtue of the laws of the State of Alabama, engaged in the business of a common carrier railroad corporation in this State, and is and has since said date been doing both interstate and intrastate business therein.

Plaintiff further avers that it had during all of said period since July 1, 1872, and prior to February 29, 1908, done all that a foreign corporation was required by the Constitution and laws of Alabama to do in order to authorize it to do business in the State of Alabama, and to that end it had a known place of business, namely, Montgomery County, in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument of writing under its corporate seal and signed officially by its President and Secretary, designating a known place of business in the State of Alabama and an authorized agent residing thereat. It also paid in each year at the time prescribed by the laws of Alabama its annual license tax to be paid by foreign corporations doing business in Alabama, and had received a license from the Secretary of State authorizing it to do business in the State of Alabama as a common carrier railroad for all years prior to and during the year 1908.

Plaintiff further avers that it qualified in good faith to do business in the State of Alabama prior to July 1, 1872, and has ever since that date owned and operated, and now owns and operates in said business in said State many millions of dollars in value of railroad and a large equipment, and that if not permitted to

6 do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless, and plaintiff avers that under duress and because of the excessive and onerous penalties provided in said Act, and especially because said statute provides that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due," plaintiff paid said sum under protest, and forthwith notified the defendant that it would sue him to recover the same, a copy of which said protest and notice is hereinafter in this complaint set out and designated as Exhibits "B" and "C," and are here referred to and made parts of this count, and plaintiff avers that defendant still holds said money, and that said Act of the Legislature of Alabama requiring it to pay

the so-called franchise tax decided of and received from it by defendant is unconstitutional and void, because, among other reasons, the imposition upon it of said so-called franchise tax is an unjust discrimination against it and a denial of the equal protection of the laws in that it is not imposed alike upon all corporations and individuals within the jurisdiction of the State of Alabama engaged in the same class of business, but is imposed on foreign corporations alone within the jurisdiction of the State of Alabama and authorized to do business therein, and is not imposed upon domestic corporations and individuals engaged in the same business under substantially the same circumstances, and no such tax or similar tax whatever is imposed for State or county purposes upon domestic corporations engaged in doing business as common carriers by railroad in the State of Alabama, either upon their capital stock or any part thereof, or upon the actual amount of their capital employed in the State of Alabama.

Plaintiff further avers that by section 229 of the Constitution of the State of Alabama, adopted November 28, 1901, it is provided that the Legislature shall by general law provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State (except strictly benevolent, educational or religious corporations), which shall be in proportion to the amount of capital stock, and by section 232 thereof it is provided that the Legislature shall by general law provide for the payment to the State of Alabama a franchise tax by foreign corporations (except strictly benevolent, educational or religious corporations), but such franchise tax shall be based on the actual amount of capital employed in this State.

The plaintiff avers that the Act aforesaid, approved March 7, 1907, by which the Legislature of Alabama undertook to impose the so-called franchise tax herein complained of, was enacted by the Legislature in pursuance of said section 232 of the State constitution, which section, so far as it attempts to authorize the Legislature by general law to provide for the payment to the State of Alabama of a franchise tax by foreign corporations authorized to do business in this State and within the jurisdiction of this State, based on the actual amount of capital employed in this State, without requiring the same tax on the same basis from domestic corporations of the State of Alabama authorized and doing business of the same or like character therein constitutes a denial to the plaintiff (which had been authorized to do business in this State long prior to the adoption of the present State Constitution of Alabama, and was then and has been ever since so engaged as a common carrier by railroad), of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is, therefore, unconstitutional and void, so far as the same affects the plaintiff herein, and plaintiff claims the protection of the provisions of the said first section of the fourteenth amendment of the Constitution of the United States, and the right thereunder to recover the money here sued for.

8 The plaintiff states that continuously since it acquired ownership of its railroad properties in Alabama, beginning with the year 1872, there have been assessed against it annually, on account of such ownership, ad valorem taxes similar to those assessed against other persons and corporations owning like property, for the benefit of the State, counties, municipalities and taxing districts or jurisdictions in this State, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and of other persons and corporations operating railroads in this State, under Section 1128 of the Code of Alabama of 1886, and Section 3480 of the Code of Alabama of 1896, since said sections were enacted and went into force and effect, respectively, up to and including the license tax based on gross earnings, imposed by the latter section, June 1, 1907, for the year ending May 31, 1908, to pay the annual expenses of the Railroad Commission of Alabama, as authorized by law.

Plaintiff has also paid on account of such ownership and operation of its railroads in Alabama all the taxes assessed against it under an Act of the Legislature of Alabama, approved March 4, 1907, known as House Bill 741, entitled "An Act to make subject to taxation and to tax the franchises or intangible property and assets of every person, association, company and corporation engaged as a common carrier in this State in the business of transporting persons or property over any railroads, etc., * * * or any other business which may be dependent upon the grant of public powers or privileges, or which may involve the operation of any public utility, and to provide for the valuation and manner of ascertaining the values of such franchises or intangible properties, and the distribution of the same for local taxation, and the levy, assessment and collection of said taxes thereon."

It has also paid the license fee and obtained the license provided for in an Act of the Legislature of Alabama, approved March 4, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or nonresident corpora-
9 tions, or corporations organized under or by authority of the law of any other State or government than the State of Alabama, and to fix a punishment for a violation thereof."

All these exactions have been made by the State of Alabama upon corporations owning and operating a railroad in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized and existing under the laws of some other State, with the sole exception of the license fee last above mentioned, and which is a nominal amount (Ten Dollars per annum), and is exacted of foreign corporations only, for, as plaintiff is advised, mere police purposes, and in order that there may be a registration, kept in the office of the Secretary of State, of such foreign corporations doing business in Alabama.

To the contrary, however, the Act of the Legislature (approved March 7, 1907), of which plaintiff is now complaining herein, and under which the plaintiff was compelled to pay the said sum of $23,659.82, does not apply, and was not intended to apply, to any

dent person or domestic corporation of the State of Alabama
ing the same character of property and carrying on the same
d of business in this State as is owned and carried on in this
te by corporations organized and existing under the laws of
ther State authorized to do and engaged in doing business in this
te, and which are within the jurisdiction thereof, nor is there
like or similar exaction by the laws of Alabama of or against
nestic corporations or resident individuals of this State owning
h or like property and engaged in such or like business.
The plaintiff states that ever since the filing of its statement in
ting with the Secretary of State of Alabama designating its
own place of business in the city of Montgomery, Montgomery
unty, Alabama, and an agent residing thereat as its authorized
nt in this State, as required by law, which was long prior to the
adoption of the present Constitution of the State of Alabama,
and ever since the filing with said Secretary of a certified copy
of its charter, or articles of incorporation, and the amendments-
reto, as required by Section 232, of that instrument, which it had
e long prior to the enactment of the statute herein complained of
plaintiff has been a person subject to and within the jurisdiction
the State of Alabama, in the sense and meaning of Section 1 of the
urteenth Amendment to the Constitution of the United States;
t the State of Alabama has exercised its jurisdiction over the plain-
continuously ever since the plaintiff began to do business and to
rate its railroads as a common carrier of freight and passengers in
State in 1872 in respect to all its properties and franchises situate
hin this State; that the State of Alabama has subjected plaintiff
the same laws to which resident persons and domestic corporations
rying on like or similar business have been subjected, until the
etment of the statute herein complained of; that under the laws
the State of Alabama there has been created the Railroad Commis-
n of this State, with large and extensive powers and authority over
plaintiff, and all other persons and corporations owning and
rating railroads in Alabama, and said Commission has at divers
es and continuously since it was created and organized, February
1881, exercised its powers, authority and control over the plain-
in sundry ways and to exactly the same extent and in the same
nner as it exercised the same over other persons or corporations
nducting the like or similar business, or owning and operating rail-
ds as common carriers of freight and passengers in Alabama.
The plaintiff states that the said Act herein complained of, as con-
ued by the defendant, imposes a tax levied on the value of plain-
's property in Alabama, but is not equal and uniform, nor levied
assessed in exact proportion to the value of all like property within
State of Alabama, and when added to the other property taxes
posed by the laws of this State, constitutes a greater rate of taxa-
tion each year for State purposes than sixty-five one hun-
dredth (.65/100) of one (1) per centum on the value of the
taxable property within this State owned by the plaintiff.
Plaintiff further alleges that the property tax imposed by the Act
March 7, 1907, as construed by defendant herein complained of,

when added to other property taxes imposed by Montgomery County for county purposes constitutes a greater rate of taxation in each year for such purposes on the value of the taxable property within this State or in said county owned by plaintiff than one-half (½) of one (1) per centum.

In construing said act of March 7, 1907, known as House Bill 611, herein complained of, the defendant as Probate Judge of Montgomery County, found that "the actual amount of capital employed in this State" by the plaintiff, as the basis of the so-called franchise tax for State and county purposes, therein provided for, was the assessed value of all of the plaintiff's tangible property situated in the State of Alabama, consisting of its road-bed, tracks and rolling stock, as assessed for the last preceding tax year, 1907, by the State Board of Assessment, and its depots, section-houses, real estate, tools, etc., as assessed for the same year, by the Tax Assessors of the several counties, thirty (30) in number, aggregating in all $15,704,215.00, as shown by a statement of the items of said tangible property and the assessed values thereof, herewith filed as part hereof and hereinafter in this complaint set out and designated as Exhibit "D," a copy of which was furnished by plaintiff to defendant at his request, and which he adopted and fixed as the basis of said tax.

The plaintiff further states that said Act herein complained of, as construed and enforced by the defendant against the plaintiff as aforesaid, imposes a property tax on the property of private foreign corporations authorized and engaged in doing business in this State, not at the same, but at a different rate than that which is imposed by the laws of Alabama for State and County purposes upon the property in this State of other private corporations, associations and individuals of this State; and, in these respects, said Act violates
12 Sections 211, 214, 215 and 217 of the Constitution of Alabama, and is, therefore, unconstitutional and void.

Third Count.

3rd. The plaintiff claims of the defendant the further sum of $23,659.82 for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon is still unpaid and is the property of the plaintiff. Said money was so received by the defendant, as the Judge of the Probate Court of Montgomery County, from the plaintiff, the Louisville & Nashville Railroad Company, as a franchise tax which the defendant demanded of the plaintiff under the provisions of an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of this State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," and the plaintiff avers that the said Act is as to it unconstitutional and void in that it impairs the obligation of the contract between plaintiff and the State of Alabama, hereinafter set out, and violates Section 22 of Article 1 of the present Constitution of Alabama, and especially Section 10 of Article 1 of the Constitution of the United States, forbidding any State from passing any law impairing the obligation of con-

tracts; for that the plaintiff is a perpetual corporation created and organized under the laws of Kentucky in the year 1850, and that by an Act of the Legislature of Kentucky, approved the sixth day of March, 1878, its charter was so amended as to authorize its president and directors, with the assent and approval of a majority in interest of the stockholders of the company present or represented at an annual or called meeting thereof, to operate, lease or purchase upon such terms or in such manner as they deemed best any railroad in any other State, or States, deemed necessary for the protection of the interests of the stockholders.

The provisions of the first section of said Act read as follows:

13 "SECTION 1. That the charter of the Louisville & Nashville Railroad Company be and is hereby so amended as to authorize its president and directors, with the assent or approval of a majority in interest of the Stockholders of the company present or represented at any annual or called meeting thereof, to operate, lease or purchase upon such terms or in such manner as they deem best, any railroad in any other State, or States, deemed necessary for the protection of the interests of the stockholders."

By an act of the Legislature of Kentucky, approved the 27th day of January, 1880, the charter of the plaintiff was further amended so as to authorize said company to purchase and hold a majority in amount of capital stock in any railroad company, or companies, chartered by any other State, or States, in order to secure to the Louisville & Nashville Railroad Company the control in the management and operation of said railroad companies in such other State, or States. The first section of said act, wherein said powers are conferred, reads as follows:

"SECTION 1. That in addition to the power and authority conferred upon the Louisville & Nashville Railroad Company by the act approved March 6, 1878, chapter 278, entitled 'An Act to amend the charter of the Louisville & Nashville Railroad Company,' 'to operate, lease or purchase upon such terms, or in such manner as the president and directors might deem best, any railroad in any other State, or States, deemed necessary for the protection of the interests of the stockholders,' the said company shall also have the power and authority to purchase and hold a majority in amount of the capital stock of any railroad company, or companies, chartered by any other State in order to secure to the Louisville & Nashville Railroad Company the control in the management and operation as aforesaid and in such other State or States; provided, that a majority in interest of the stockholders of the company present or represented by proxies at any annual or called meeting thereof shall accept this act as an amendment to its charter."

14 And the plaintiff avers that both of said amendments to its charter were duly accepted by a majority in interest of the stockholders of the plaintiff present and lawfully represented by proxies at a meeting of the stockholders of the plaintiff duly held for that purpose, prior to February 8, 1891, and that the plaintiff has ever since exercised the said powers conferred by said amendment by and with the consent of its stockholders.

The plaintiff states that the Legislature of Alabama passed an Act, which was approved February [illegible], 1891, and was afterward incorporated as Section 1169 in the Code of Alabama of 1896 and has ever since its enactment remained in full force and effect, as follows:

"Domestic may sell its property and franchises to Foreign corporation.—Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock all of its property, road-bed, rights and franchises; but the purchasing corporation shall keep an office and an agent in this State; and such railroad so purchased shall be, in all respects, subject to the laws of this State as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired."

The plaintiff states that the Legislature of Alabama passed an Act, which was approved February 11, 1891, and was afterward incorporated as Section 1170 in said Code, and has ever since its enactment remained in full force and effect, as follows:

"Aid to, or purchase and lease of other roads.—A corporation, chartered under the laws of this or any other State heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of the laws of this or any other State, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with, and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof, at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

Plaintiff avers that it is a foreign corporation within the meaning of said Act, having been duly incorporated and organized under an Act of the General Assembly of the State of Kentucky, approved March 5, 1850, by which, and the amendments thereto enacted by said General Assembly March 6, 1878, and January 27, 1880, it was authorized and empowered to perpetually own, purchase, construct, lease, operate, control and maintain railroads in the State of Kentucky, Alabama and other States, and is and has been since

y 1, 1872, under and by virtue of the laws of the State of Ala-
ma, engaged in the business of a common carrier railroad corpora-
n in this State, and is and has since said date been doing both
erstate and intrastate business therein.

Plaintiff further avers that it had during all of said period since
y 1, 1872, and prior to February 29, 1908, done all that a foreign
corporation was required by the Constitution and laws of
Alabama to do in order to authorize it to do business in the
State of Alabama, and to that end it had a known place of
siness, namely, Montgomery County, in said State, and an au-
rized agent residing therein, and had filed with the Secretary of
te of Alabama a certified copy of its charter, and also an instru-
nt of writing under its corporate seal and signed officially by its
esident and Secretary, designating a known place of business in
State of Alabama and an authorized agent residing thereat. It
paid in each year at the time prescribed by the laws of Alabama
annual license tax to be paid by foreign corporations doing busi-
s in Alabama, and had received a license from the Secretary of
te authorizing it to do business in the State of Alabama as a
mmon carrier railroad for all years prior to and during the year
08.

The plaintiff acquired its several properties in Alabama as follows:
. The Alabama & Florida Railroad Company was duly incor-
ated and organized August 23, 1898, under the laws of Alabama;
t plaintiff at the time of the organization of said company was and
l is the owner of its entire capital stock; and on December 17,
00, said company sold and conveyed to plaintiff by deed of record
its property and franchises, including 32.76 miles of main line
lroad in Alabama then in operation and 14.91 miles of main line
lroad then in course of construction in Alabama, and which has
ce been finished and put into operation. The assessed value of
road-bed, tracks and equipment of said Alabama & Florida Rail-
d in 1907 was $1,066,440, and the assessed value of the local
operty thereon and belonging thereto for the same year was
1,540.

2. The plaintiff avers that the Alabama Mineral Railroad Com-
ny was duly incorporated and organized July 28, 1890, under the
s of Alabama; that plaintiff at the time of the organization of
l company was and still is the owner of its entire capital stock;
and on September 29, 1903, said company sold and conveyed
to plaintiff by deed of record all its property and franchises,
including 132.30 miles of main line railroad in Alabama.
e assessed value of the road-bed, tracks, and equipment of the said
labama Mineral Railroad in 1907 was $1,830,080.00 and the as-
sed value of the local property thereon and belonging thereto for
same year was $53,390.00.

3. The plaintiff avers that the Birmingham Mineral Railroad
mpany was duly incorporated and organized March 19, 1884,
der the laws of Alabama; that plaintiff at the time of the organi-
ion of said company was and still is the owner of its entire capital
k; and on January 11, 1904, said company sold and conveyed to

plaintiff by deed of record all its property and franchises, including 169.80 miles of main line railroad in Alabama. The assessed value of the roadbed, tracks and equipment of the said Birmingham Mineral Railroad in 1907 was $3,623,345.00, and the assessed value of the local property thereon and belonging thereto for the same year was $46,495.00. Included in these assessments as a part of the Birmingham Mineral Railroad were the properties of the Oneonta & Ottalla Railroad Company, which was duly incorporated and organized June 23, 1900, under the laws of Alabama; that plaintiff at the time of the organization of said company was and still is the owner of its entire capital stock; and on December 15, 1900, said company sold and conveyed to plaintiff by deed of record 11.3 miles of its main line railroad, and on September 23, 1905, sold and conveyed to plaintiff by deed of record 15.6 miles of its main line railroad.

Included also in the last mentioned assessments, as a part of the Birmingham Mineral Railroad, were the properties of the North Alabama Railroad Company, which was duly incorporated and organized March 17, 1900, under the laws of Alabama; that plaintiff at the time of the organization of said company was and still is the owner of its entire capital stock; and on December 15, 1900, said company sold and conveyed to plaintiff by deed of record its Brookwood Brand, being 3.4 miles of main line railroad, and on
18 May 1, 1905, said company sold and conveyed to plaintiff by deed of record the remainder of its properties and franchises, including 32.205 miles of main line railroad.

4. The plaintiff avers that Birmingham, Selma & New Orleans Railroad Company was duly incorporated and organized November 16, 1886, under the laws of Alabama; that plaintiff on September 10, 1900, became the owner of its entire capital stock, and has ever since been the owner thereof; and on April 21, 1902, said company sold and conveyed to plaintiff all its properties and franchises, including 60.3 miles of main line railroad in Alabama, known as the Myrtlewood Branch. The assessed value of the road-bed, tracks and equipment of the said Myrtlewood Branch in 1907 was $504,915.00 and the assessed value of the local property thereon and belonging thereto for the same year was $15,850.00.

5. The plaintiff avers that the Montgomery and Prattville Railroad Company was duly incorporated and organized March 29, 1895, under the laws of Alabama; that plaintiff at the time said company was organized owned and still owns its entire capital stock; and on March 9, 1896, and June 3, 1896, said company sold and conveyed to plaintiff by deeds of record all its properties and franchises, including 10.35 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of the said Montgomery & Prattsville Railroad in 1907 was $69,695.00 and the assessed value of the local property thereon and belonging thereto for the same year was $2,080.00.

6. The plaintiff further avers that the Mobile & Montgomery Railway Company was a corporation under the laws of Alabama, and was created and organized as follows: By an Act of the Legislature

of Alabama, approved February 11, 1850, the Alabama & Florida Railroad Company was incorporated and the charter thereof was subsequently amended by several acts of the Legislature of the State of Alabama, approved respectively February 16, 1854, and February 20, 1854.

By an act of the Legislature of Alabama, approved February 15, 1857, the Mobile & Great Northern Railroad Company was incorporated and the same thereafter amended by an act of the Legislature of the State of Alabama, approved February 8, 1858. The said two corporations were consolidated into one company under the name and style of the Mobile & Montgomery Railroad Company under powers conferred upon them by an act of the legislature of Alabama, approved August 5, 1868, amended by an act of the Legislature of Alabama, approved December 28, 1868, and by and under the terms of said act of consolidation the said Mobile & Montgomery Railroad Company owned and possessed all of the property rights and franchises conferred upon the Alabama & Florida Railroad Company and the Mobile & Great Northern Railroad Company under and by virtue of their said several charters.

Plaintiff further avers that under the charter of the said Alabama & Florida Railroad Company and of the said Mobile & Great Northern Railroad Company, said companies had the power and the perpetual franchise to construct and operate a railroad between the City of Montgomery and the City of Mobile, and did so construct and operate said railroad, and the railroad so constructed and operated by them was, by said act of consolidation, obtained by and became the property of the Mobile & Montgomery Railroad Company, which said company thereafter operated said railroad under said perpetual franchise. The said Mobile & Montgomery Railroad Company had the authority and power under its said charter to mortgage all of its property rights and franchises, and under and pursuant to said authority it did mortgage all of its property rights and franchises by a deed of trust executed to Philo C. Calhoun, Timothy Porter and Josiah Morris on the 25th day of February, 1870, to secure certain bonds issued by it. Default was made in the payment of the said debt secured by said deed of trust, and said deed of trust or mortgage was foreclosed, and the property and franchises covered thereby sold on November 14, 1874, under decree of the chancery court for the second district, southern chancery division of Alabama, and purchased for the holders of the bonds secured by said deed of trust by the trustee named therein, and thereafter said purchasers organized themselves into a corporation under the name of the Mobile & Montgomery Railway Company under and pursuant to the general laws of Alabama for such cases made and provided. The conveyance of said property and franchises of the said Mobile & Montgomery Railroad Company was executed under the orders of said court to the Mobile & Montgomery Railway Company, and said Company thereafter owned and exercised said franchises and operated said railroad property until the 17th day of December, 1900. On and prior to said date, the plaintiff obtained and became the owner of all of the capital stock of the said Mobile & Mont-

gomery Railway Company, and with the approval of a majority in interest of its stockholders present and represented at a called meeting thereof, the plaintiff purchased all of the property and franchises of the said Mobile & Montgomery Railway Company, including 178.57 miles of main line railroad in Alabama, and at the last mentioned date obtained a conveyance to it of said property and franchises executed in due form of law by the said Mobile & Montgomery Railway Company, which is of record, and the plaintiff has ever since said date owned said property and franchises and exercised the same by operating said property as a common carrier of interstate and intrastate commerce in the State of Alabama.

The assessed value of the road-bed, tracks and equipment of said Mobile & Montgomery Railway in 1907 was $1,064,580.00 and the assessed value of the local property thereon and belonging thereto for the same year was $225,539.00.

7. The plaintiff avers that the New Orleans, Mobile & Texas Railroad Company, as re-organized, was duly incorporated and organized April 29, 1880, under the laws of Alabama; that at the time said company was thus organized the plaintiff was and ever since has been the owner of said company's entire capital stock; and on
21 October 5, 1881, said company sold and conveyed to plaintiff by deed of record all of its properties and franchises, including 29.24 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of said New Orleans, Mobile & Texas Railroad, in Alabama, in 1907 was $730,380.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $303,123.00.

8. The plaintiff avers that the Nashville, Florence & Sheffield Railway Company was duly incorporated and organized May 13, 1887, under the laws of Alabama; that the entire amount of the capital stock of said company issued was $862,050, of which stock the plaintiff had at various dates prior to April 10, 1900, acquired and become the owner of $804,950. All the properties and franchises of said company were sold at decretal sale April 10, 1900, and were purchased by the plaintiff, and on May 31, 1900, said company's properties and franchises, including 17.19 miles of main line railroad in Alabama so purchased by plaintiff were conveyed by a Special Master of the court, having jurisdiction of the subject matter and the parties, and decreeing the sale aforesaid; and on the same date the said company sold and conveyed by deed of record its equity of redemption in said properties and franchises to the plaintiff herein. The said sales and conveyances rendered all the capital stock in said Nashville, Florence & Sheffield Railroad Company worthless. The assessed value of the road-bed, tracks and equipment of said last named railroad in Alabama in 1907 was $200,870.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $18,900.00.

9. The plaintiff avers that the Pensacola Railroad Company was duly incorporated and organized February 27, 1877, under the laws of Florida; that on February 27, 1880, the plaintiff had become the owner of the entire capital stock of said company; and on Octo-

er 22, 1880, said company sold and conveyed all its properties and franchises to the plaintiff by deed of record, including .1 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of said Pensacola Railroad in Alabama in 1907 was $4,920.00 and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $400.00.

10. The plaintiff avers that the Southern Alabama Railroad Company was duly incorporated and organized January 21, 1899, under the laws of Alabama; that at the time said company was organized the plaintiff was and has been ever since the owner of its entire capital stock; and on December 11, 1899, the said company sold and conveyed to plaintiff by deed of record all its property and franchises including 109.29 miles of main line railroad in Alabama.

The plaintiff further avers that the Montgomery, Hayneville & Camden Railroad Company was duly incorporated and organized December 11, 1890. Subsequently and prior to June 7, 1900, the plaintiff became the owner of the entire amount of said company's capital stock, and on the last mentioned date said company sold and conveyed to plaintiff by deed of record all its properties and franchises, including a right of way and partially constructed road-bed a distance of about 7.5 miles in Alabama, which partially constructed road-bed thus acquired was completed and put in operation February 15, 1901, thus forming what is now the Camden Branch of said Southern Alabama Railroad. The assessed value of the roadbed, tracks and equipment of said Southern Alabama Railroad (including said Camden Branch) in 1907 was $1,169,670.00, and the assessed value of the local property thereon and belonging thereto for the same year was $27,970.00.

11. The plaintiff further avers that the Tennessee & Alabama Central Railroad Company was a railroad company chartered by an act of the Legislature of the State of Alabama, approved December 19, 1853, with a perpetual franchise and power and authority in and by its charter to construct, maintain and operate a railroad from Montevallo, in Shelby County, in a northeastern direction, through Decatur, in Morgan County, and across the Tennessee River at a point, thence through Athens, in Limestone County, and from thence to some point on the boundary line between the State of Alabama and State of Tennessee, thence to connect with a railroad leading from Pulaski to Columbia, Tennessee; in and by said charter the said Railroad Company had further power for the purpose of uniting with other railroads, as well as to extend its road, to build and construct branch railroads not more than five miles in length on either side of said main road in any of the counties near the main road, and also had power and authority to form junctions with other railroads.

Such railroad company had, under its charter, the further power and authority to unite and consolidate into one road all or any parts of said railroad with any other railroad that might connect with its railroad at the Tennessee line.

The said Tennessee & Alabama Central Railroad Company, under

and pursuant to its said charter power and franchise constructed a railroad from what is now known as the Memphis & Charleston Junction, on or near the Tennessee River, northwardly to the Tennessee line near Veto, Alabama, and was thereafter, in the year 1866, consolidated with other railroads created by and organized under the laws of Tennessee, whose railroad connected with the railroad of the Tennessee & Alabama Railroad Company at the Tennessee line. The said consolidation made and the railroad corporation formed thereby is known as the Nashville & Decatur Railroad Company, and this railroad extended from Nashville, in the State of Tennessee, to the Memphis & Charleston Junction on the Tennessee river in the State of Alabama. .

On and prior to the 18th day of October, 1899, the railroad of the plaintiff extended from the City of Louisville, in the State of Kentucky, to the City of Nashville, in the State of Tennessee, and was there connected or continuous with the line of said Nashville & Decatur Railroad Company, and on the said 18th day of October, 1899, the plaintiff, the Louisville & Nashville Railroad Company, with the assent or approval of a majority in interest of its stockholders present or represented at a called meeting thereof, leased by written
24 lease duly executed and of record the property and franchises of the said Nashville & Decatur Railroad Company, including 26.42 miles of main line railroad in Alabama, for a term of 999 years to commence on the first day of July, 1900, and the plaintiff has ever since been in possession of said railroad, its property and franchises, under said lease, and has been operating the same as a common carrier of interstate and intrastate commerce in the State of Alabama, as well as in the State of Tennessee.

The assessed value of the road-bed, tracks and equipment of said Nashville & Decatur Railroad in Alabama in 1907 was $720,200, and the assessed value of the local property thereon and belonging thereto in Alabama, including the shops, machinery, etc., on main stem at New Decatur, for the same year was $248,650.

12. The plaintiff avers that the rolling stock or equipment owned by it, but used by the South & North Alabama Railroad Company, and assessed in Alabama, with the road-bed, tracks and equipment of the latter company (not including the equipment owned by the latter company) in 1907, was assessed at $753,363.

The plaintiff further states that all the assessed values herein above set forth in this count were embraced by the defendant in his total valuation of the tangible properties of plaintiff, amounting to $15,704,215, and forming the basis of fixing the so-called franchise tax, aggregating for State and county purposes $23,659.82, against plaintiff under the act of March 7, 1907, herein complained of, as shown by Exhibit "D" hereinabove referred to and made part of the second count of this complaint, and now referred to and made part of this count.

The plaintiff also files herewith as part of this count a statement designated as Exhibit "E," showing in detail the items of local property on and belonging to each of the above mentioned railroads or

divisions in Alabama owned and operated by plaintiff, and
25 the counties wherein such items are located, and the assessed values thereof in each county for the year 1907, as hereinbefore stated.

The plaintiff avers that ever since it acquired and purchased the capital stock, properties and franchises of the said several domestic railroad corporations for valuable considerations amounting to many millions of dollars paid therefor by plaintiff, it has owned and exercised the same by operating said properties and franchises as a common carrier of interstate and intrastate commerce in the State of Alabama.

Plaintiff further avers that under and by virtue of its several purchases of the capital stock, physical properties and franchises of the domestic railroad corporations aforesaid, and the lease aforesaid of the Nashville & Decatur Railroad in Alabama, all of which it made relying upon the then existing laws of Alabama, it made and entered into lawful contracts with said several companies whose properties, rights and franchises it purchased and leased, which said contracts were duly authorized by such laws, whereby it obtained the right to do both an intrastate and an interstate business as a common carrier of freight and passengers in the State of Alabama by and over said railroads so purchased and leased.

The plaintiff further avers that by virtue of the provisions of said Section 1169 of the Code of Alabama of 1896, on which plaintiff relied in good faith, all of the properties, road-beds, tracks, equipments and franchises of the aforesaid domestic railroad corporations purchased by and conveyed to the plaintiff, whose capital stock it had previously acquired, remained and continued, in all respects, subject to the laws of Alabama as if owned by domestic corporations, and by the purchase and lease of said railroads a further contract was thereby made and entered into for a good and valuable consideration, by and between the State of Alabama and the plaintiff, whereby all of said properties and franchises were never to be taxed or treated in any respect as if owned or operated by a foreign corporation, or otherwise taxed or treated in any respect than if the same were owned and operated by a domestic corporation of Alabama.

26 Plaintiff avers and insists that the obligations of said several contracts, or either of them, cannot be lawfully impaired by imposing upon the plaintiff, or its said properties and franchises in Alabama acquired as aforesaid, any burdens by taxation or otherwise other than such as are imposed upon corporations incorporated and organized under the laws of Alabama engaged under substantially the same conditions in the same kind of business; and that the said act of March 7, 1907, herein complained of under which said so-called franchise tax was demanded and received from it by defendant unjustly discriminates against the plaintiff by imposing upon it a burden of taxation not imposed by law upon individuals or domestic corporations engaged in the same business under substantially the same conditions, and thereby impairs the obligation both of the said several contracts entered into by and between the plaintiff and the said railroad corporations whose prop-

erties, rights and franchises it purchased and the obligations of said several contracts between the State of Alabama and the plaintiff arising out of said several purchases; and that the said law is, therefore, in conflict with so much of the tenth section of Article 1 of the Constitution of the United States as prohibits the State of Alabama from passing any law impairing the obligation of contracts and is void, and the plaintiff here claims the protection of the said provisions of section ten of article one of the Constitution of the United States and claims thereunder the right to recover the money sued for under this count.

The plaintiff further states that none of the several domestic corporation whose properties, rights and other franchises were sold and conveyed to plaintiff, so conveyed the franchise to be a corporation, but retained the same and each of said corporations still exists as a corporation. To set forth the several franchises of each of the domestic railroad corporations of Alabama, whose capital stock is acquired, and whose physical properties and franchises were sold and conveyed to plaintiff as hereinabove set forth, would result in making this complaint greatly prolix, but plaintiff states that
27 each of said vendor domestic railroad corporations had power and a perpetual franchise to own and operate as a common carrier of freight and passengers in the State of Alabama the railroad by it sold or leased to plaintiff.

The plaintiff states that the enforcement of the tax imposed by said Act of March 7, 1907, herein complained of, against plaintiff would impair the obligation of the contract aforesaid between the State of Alabama and the plaintiff, and the enforcement of the penalties and forfeitures therein prescribed against the plaintiff for non-payment of said tax, whereby plaintiff would be prohibited from carrying on the business of a common carrier by railroad of intrastate freight and passengers, and from maintaining or demanding any action in any of the courts of this State, upon a contract made in this State other than contracts based upon inter-state commerce would deprive plaintiff of its property and the use thereof in intrastate commerce, as well as the greater part of its value, without due process of law, and would amount to a denial to it of the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The plaintiff avers that the defendant is the Judge of the Probate Court of Montgomery County, Alabama, and that on the 29th day of February, 1908, and for many years prior thereto, the plaintiff had a resident agent in the City of Montgomery in said County, and the defendant as Judge aforesaid demanded of the plaintiff payment of the so-called franchise tax provided for by said Act of March 7, 1907, hereinbefore referred to and complained of.

And the plaintiff avers that it owned and operated in said business in said State many millions of dollars of railroad and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn, with said property, the costs of operating the same and the value of said property would thereby be ruined and rendered almost valueless. And plaintiff

avers that, under duress, because of the provisions of said
28 law prohibiting the plaintiff from doing any business in the State of Alabama not constituting interstate commerce or to maintain and demand any action in any of the courts of this State upon a contract made in this State other than contracts based on interstate commerce, unless it shall have paid said tax within sixty days after the same became due, and because of other penalties with which it was threatened for a failure to pay said taxes, it caused its Vice-President and Secretary to make a written statement under their oaths to the defendant, as the Judge of Probate of Montgomery County, showing the name of the plaintiff, the State and county under whose law it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock, the actual amount of capital employed in this State, and delivered said statement under protest to the defendant, as Judge of the Probate Court of Montgomery County, a copy of said statement is hereinafter set out and marked in the margin Exhibit "A," and is here referred to and made a part of this count. By said statement the actual amount of capital employed by the defendant in the State of Alabama is given at the sum of $4,295,950.77. Upon the presentation of said statement to him, the defendant, as the Judge of the Probate Court of Montgomery County, caused one of the officers of the plaintiff to come before him and to be sworn and examined him with reference to said matter, and after an examination of said officer, said Probate Judge declared that the assessed value of all tangible property of the plaintiff employed in the State of Alabama without deducting the amount of liens and mortgages thereon to be $15,704,215.00, and that such value of all of the tangible property of the plaintiff in the State of Alabama was "The actual amount of its capital employed in this State" within the meaning of the said Act of the Legislature of Alabama, approved March 7, 1907, known as House Bill Number 611, and entitled "An Act to provide for the revenue of this State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax," and further found that the
29 amount of the franchise tax calculated upon said basis and due to the State of Alabama was $15,773.22, and the amount of said tax payable to the county was $7,886.60, aggregating the sum of $23,659.82, which said sum the defendant, as such Judge of Probate, demanded of the plaintiff as an annual franchise tax due under the provisions of said Act for the current year, and the plaintiff, under duress because of the provisions of said Act of the Legislature of the State of Alabama, providing that no foreign corporation shall do business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in the courts of the State of Alabama upon a contract made in said State other than contracts based on interstate commerce, unless such corporation shall have paid said tax within sixty days after the same becomes due, and because of other penalties with which it was threatened for its failure to pay said tax, paid said tax under protest to the defendant, which said protest is hereinafter in this complaint set out and

marked in the margin Exhibit "B," and is here referred to and made part of this count.

Plaintiff avers that immediately upon the payment of said tax, it notified the said Judge of Probate not to pay said taxes over to the State of Alabama, or any other person, and that suit would be, within a reasonable time, brought against him for the recovery of the same, which said notice is hereinafter in this complaint set out and marked in the margin Exhibit "C," and is here referred to and made part of this count. And plaintiff further avers that the defendant still has possession of the money so paid to him.

Fourth Count.

4. The plaintiff claims of the defendant the further sum of $17,283.18, money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum with interest thereon is still due and unpaid, and is the property of the plaintiff. Said money was demanded and received from the plaintiff by the defendant, as the Judge of the Probate Court of Montgomery County, as a franchise tax that the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto, a foreign corporation created and organized under the laws of the State of Kentucky, doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its First Vice-President and Secretary to make a written statement under oath to the defendant as the Judge of the Probate Court of Montgomery County, said County being one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock and the actual amount of capital employed in the State of Alabama, by which said statement it was shown that the actual amount of the capital stock employed by the plaintiff in the State of Alabama was $4,295,950.77, and thereupon the defendant, as such judge of the probate court of Montgomery County, swore and examined one of the plaintiff's officers as to the amount of the capital of the plaintiff actually employed in the State of Alabama, and in and by such examination of such officer it was shown, as was a fact, that the actual amount of capital employed by the plaintiff in the State of Alabama for the year ending June 30, 1907, in operating its railroad, exclusive of the amount invested in road-bed, equipments and other permanent property was $6,307,649.03, and the defendant, as such Judge of Probate, so found and declared.

The plaintiff further avers that its fiscal year is and for a long time has been from June 30 of each year to June 30 of the next

succeeding year, and that all of its accounts are and have been for a long time kept from June 30th of each year to June 30th of the next year, and that the said fiscal year from June 30, 1906,
31 to June 30, 1907, was plaintiff's last fiscal year prior to the 29th day of February, 1908. Plaintiff further avers that the actual amount of capital employed by it in the State of Alabama for the calendar year ending January 1, 1908, in operating its railroads, exclusive of the amount invested in its roadbeds, equipment and other permanent improvement did not exceed said sum of $6,307,649.03, and that the amount of the franchise payable under said act for the use of the State was $6376.64.

The plaintiff further avers that the defendant, as such Judge of Probate, further found that the said amount of capital so employed by the plaintiff in the State of Alabama did not constitute the true basis for determining the actual amount of capital employed by the plaintiff in the State of Alabama within the meaning of the said act of the Legislature of the State of Alabama, and that the value of all of the plaintiff's tangible property employed in the State of Alabama without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of said act, and, as was a fact, that upon that basis the amount of the plaintiff's capital so employed was $15,704,215.00, and further found that the sum of $15,773.22 was the amount of the franchise tax due by the plaintiff to the State of Alabama under said act, and that the sum of $7886.60 was the amount of such tax due to the County, and that said sums aggregate the sum of $23,659.82, which said sum he, as such Judge of Probate, demanded of the plaintiff and declined to receive of the plaintiff any other smaller sum.

And plaintiff avers that it owned and operated in said business in said State many millions of dollars of railroad and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn, with said property, the costs of operating the same, and the value of said property would thereby be ruined and render said property almost valueless. And plaintiff avers that under duress, because of the provisions of said act of the
32 Legislature providing for said tax, whereby plaintiff was and is, upon its failure to pay said taxes within sixty days after the same became due, prohibited from doing any business in the State of Alabama not constituting interstate commerce and from maintaining or demanding any action in any of the courts of the State of Alabama upon a contract made in said state other than contracts based upon interstate commerce, and because of other penalties for its failure or refusal to pay said taxes with which it was threatened, the plaintiff paid to the defendant, under protest, the said sum of $23,659.82 by the defendant demanded, although there was not due upon said franchise tax more than the sum of $6376.64.

And the plaintiff avers that immediately upon the payment of said sum to the defendant, it notified him that the amount so demanded and paid was excessive and that suit would, within a reasonable time, be brought against him to recover the same, and not to pay over said

sum to the authorities of the State of Alabama until the rights of the plaintiff in said matter should be adjusted. Copies of the said statement made to the defendant and said protest and notice of suit are hereinafter set out as part of this complaint marked Exhibits "A," "B" and "C," and made parts of this count.

Plaintiff further avers that defendant still has possession of the money paid to him as aforesaid.

Fifth Count.

5. The plaintiff, a corporation, claims of the defendant the further sum of $14,094.86, money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum with interest thereon is still due and unpaid, and is the property of the plaintiff. Said money was demanded and received from the plaintiff by the defendant as the Judge of the Probate Court of Montgomery County as a franchise tax that the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

33 And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto, a foreign corporation created and organized under the laws of the State of Kentucky, doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its first Vice-President and Secretary to make a written statement under oath to the defendant as the Judge of the Probate Court of Montgomery County, said county being one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock and the actual amount of capital employed in the State of Alabama, by which said statement it was shown that the actual amount of the capital stock employed by the plaintiff in the State of Alabama was $1,295,950.77, and thereupon the defendant, as such Judge of the Probate Court of Montgomery County, swore and examined one of the plaintiff's officers as to the amount of the capital of the plaintiff actually employed in the State of Alabama, and in and by such examination of such officer it was shown, as was a fact, that the actual amount of capital employed by the plaintiff in the State of Alabama for the year ending June 30, 1907, in operating its railroad, exclusive of the amount invested in road-bed, equipments and other permanent property was $6,307,649.03, and the defendant as such Judge of Probate, so found and declared.

The plaintiff further avers that its fiscal year is and for a long time has been from June 30th of each year to June 30th of the next succeeding year, and that all of its accounts are and have been for a long time kept from June 30th of each year to June 30th of the next year, and that the fiscal year from June 30th, 1906, to June 30th

1907, was plaintiff's last fiscal year prior to the 29th day of February, 1908. Plaintiff further avers that the actual amount of capital employed by it in the State of Alabama for the calendar year
34 ending January 1, 1908, in operating its railroads, exclusive of the amount invested in its roadbeds equipment and other permanent improvement did not exceed said sum of $6,307,649.03, and that the amount of the franchise tax payable under said act for the use of the state and county was $9,564.96.

The plaintiff further avers that the defendant, as such Judge of Probate, further found that the said amount of capital so employed by the defendant in the State of Alabama did not constitute the true basis for determining the actual amount of capital employed by the plaintiff in the State of Alabama within the meaning of the said act of the Legislature of the State of Alabama, and that the value of all of the plaintiff's tangible property employed in the State of Alabama without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of said Act, and, as was a fact, that upon that basis the amount of the plaintiff's capital so employed was $15,704,245.00, and further found that the sum of $15,773.22 was the amount of the franchise tax due by the plaintiff to the State of Alabama under said act, and that the sum of $7,886.60 was the amount of such tax due to the County, and that said sums aggregate the sum of $23,659.82, which said sum he, as such Judge of Probate, demanded of the plaintiff and declined to receive of the plaintiff any other smaller sum.

And plaintiff avers that it owned and operated in said business in said State many millions of dollars of railroad and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered almost worthless. And plaintiff avers that, under duress because of the provisions of said act of the Legislature providing for said tax, whereby plaintiff was and is, upon its failure to pay said taxes within sixty days after the same became due, pro-
hibited from doing any business in the State of Alabama not
35 constituting interstate commerce and from maintaining or demanding any action in any of the courts of the State of Alabama upon a contract made in said state other than contracts based upon interstate commerce, and because of other penalties for its failure or refusal to pay said taxes with which it was threatened, the plaintiff paid to the defendant, under protest, the said sum of $23,659.82 by the defendant demanded, although there was not due upon said franchise tax more than the sum of $9,564.96.

And the plaintiff avers that immediately upon the payment of said sum to the defendant, it notified him that the amount so demanded and paid was excessive, and that suit would, within a reasonable time, be brought against him to recover the same, and not to pay over said sum to the authorities of the State of Alabama until the rights of the plaintiff in said matter should be adjudicated. Copie of the said statement made to the defendant and said protest and notice of suit

are hereinafter set out as part of this complaint and marked Exhibits "A," "B," and "C," and are here referred to and made parts of this count.

Plaintiff further avers that defendant still has possession of the money paid to him as aforesaid.

Sixth Count.

6. Plaintiff, a corporation, claims of the defendant the further sum of $19,294.87, money on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which said sum, with interest thereon, is still due and unpaid, and is the property of the plaintiff. Said money was demanded and received from the plaintiff by the defendant as Judge of the Probate Court of Montgomery County as a franchise tax which the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto,
36 a foreign corporation created and organized under the laws of Kentucky, doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its First Vice-President and Secretary to make a written statement under oath to the defendant, as the Judge of the Probate Court of Montgomery County, said county being one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock, and the actual amount of capital employed in the State of Alabama, a copy of said statement is hereinafter set out in this complaint and marked on the margin Exhibit "A" and is here referred to and made part of this count. By said statement it was shown that the actual amount of capital stock employed in the State of Alabama by the plaintiff was $4,295,950.77, and thereupon the defendant, as such Judge of the Probate Court of Montgomery County, swore and examined one of Plaintiff's officers as to the amount of capital of the plaintiff actually employed in the State of Alabama, and in and by such examination of such officer, the following facts were shown and were true, viz.: That the amount of plaintiff's whole capital stock at its par value was $60,000,000.00; that the market value per share of such capital stock was $92.125 and its par value $100.00 per share; that $34,300,410.24 of said capital was invested in stocks and bonds not connected with railroad lines operated as a part of plaintiff's railroad system, and that the remainder, at par value, of plaintiff's capital stock which was the total amount invested in railroad lines operated as a part of its system of railroads was $25,799,589.76. That the total value of its capital stock employed in the State of Alabama was 19.17% of its entire capital stock invested in railroad lines operated as a part of its system.

which at par value makes $4,945,781.28, of which said sum $282,
505.49 was invested in railroad property in the State of Alabama
owned by domestic corporations, that the value of the remain-
37 ing stock at market value was $4,295,950.77, and plaintiff
avers that the franchise tax provided to be paid by the first
ection of said act upon the plaintiff's actual capital employed in the
State of Alabama estimated at said sum of $4,295,950.77 was
$4,364.95.

The plaintiff avers that the defendant, as such Judge of Probate,
urther found that the said sum of $4,295,950.77 market value, was
ot the actual amount of capital employed by the defendant in the
State of Alabama within the meaning of said act of the Legislature
nd did not constitute the true basis for determining the actual
mount of capital employed in the State of Alabama within the
eaning of said act of the Legislature of the State of Alabama, but
hat the value of its tangible property employed in the State of Ala-
ama without deducting therefrom the amount of the mortgages and
iens thereon, was the actual amount of its capital employed in the
State of Alabama within the meaning of said act, and further found,
s was a fact, that upon that basis the amount of the plaintiff's
apital so employed was $15,704,215.00, and further found that the
um of $15,773.22 was the amount of the franchise tax due by the
laintiff to the State of Alabama under said act, and that the sum
f $7,886.00 was due to the county as a tax under said act, and that
aid sums aggregate the sum of $23,659.82, which said sum he, as
udge of Probate, demanded of the plaintiff and declined to receive
f the plaintiff any smaller sum.

And the plaintiff avers that it owned and operated in said business
n said state many millions of dollars of railroad and a large amount
f equipment and that if not permitted to do an intrastate business
n Alabama, plaintiff could not earn with said property the costs of
perating the same and the value of said property would thereby be
ained and rendered almost valueless. And plaintiff avers that under
ress and because of the provisions of said act of the Legislature
roviding for said tax, whereby plaintiff was and is, upon its failure
o pay said tax within sixty days after the same became due, pro-
ibited from doing any business in the State of Alabama not con-
stituting interstate commerce and from maintaining or de-
s manding any action in any of the courts of the State of Ala-
bama upon a contract made in said state other than contracts
sed upon interstate commerce and because of other penalties for
s failure or refusal to pay said taxes with which it was threatened,
he plaintiff paid to the defendant under protest the said sum of
23,659.82 by the defendant demanded, although there was not due
pon said franchise tax more than the sum of $4364.95.

And the plaintiff avers that immediately upon the payment of
id sum to the defendant, it notified him that the amount so de-
anded and paid was excessive, and that suit would, within a reason-
le time, be brought against him to recover the same, and not to
y over said sum to the authorities of the State of Alabama until
he rights of the plaintiff in said matter could be adjudicated. Copies

of the said statement and of said protest and notice of suit are hereinafter set out as parts of this complaint marked Exhibits "A," "B" and "C," and are here referred to and made parts of this count. Plaintiff further avers that defendant still has possession of the money paid to him as aforesaid.

Seventh Count.

7. Plaintiff, a corporation, claims of the defendant the further sum of $18,927.65 money on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which said sum with interest thereon, is still due and unpaid, and is the property of the plaintiff. Said money was demanded and received from the plaintiff by the defendant as Judge of the Probate Court of Montgomery County as a franchise tax which the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto a foreign corporation created and organized under the laws of Ken-
39 tucky doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its First Vice-President and Secretary to make a written statement under oath to the defendant, as the Judge of the Probate Court of Montgomery County, said County being one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amou*n*t of its capital stock, and the actual amount of capital employed in the State of Alabama. A copy of said statement is hereinafter set out in this complaint and marked in the margin Exhibit "A" and is here referred to and made part of this count. By said statement it was shown that the actual amount of capital stock employed in the State of Alabama by the plaintiff was $1,295,950.77, and thereupon the defendant, as such Judge of the Probate Court of Montgomery County, swore and examined one of plaintiff's officers as to the amount of capital of the plaintiff actually employed in the state of Alabama, and in and by such examination of such officer the following facts were shown and were true, viz.: That the amount of plaintiff's whole capital stock at its par value was $60,000,000.00; that $34,300,410.24 of said capital was invested in stocks and bonds not connected with railroad lines operated as a part of plaintiff's railroad system, and that the remainder, at par value, of plaintiff's capital stock which was the total amount invested in railroad lines operated as a part of its system of railroads was $25,799,589.76. That the total value of its capital stock employed in the State of Alabama was 19.17% of its entire capital stock invested in railroad lines operated as a part of its system, which at par makes $4,945,781.36, of which said sum $282,605.49 was invested

in railroad property in the State of Alabama owned by domestic corporations, and that the franchise tax provided to be paid by the first section of said act upon the plaintiff's actual capital employed in the State of Alabama estimated at the remaining $4,663,175.87, was $4,732.17.

The plaintiff avers that the defendant, as such Judge of Probate, further found, that the said sum of $4,663,175.87 was not the actual amount of capital employed by the defendant in the State of Alabama within the meaning of said act of the Legislature and did not constitute the true basis for determining the actual amount of capital employed in the State of Alabama within the meaning of said act of the Legislature of the State of Alabama, but that the value of its tangible property employed in the State of Alabama without deducting therefrom the amount of the mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of said act, and further found, as was a fact, that upon that basis the amount of the plaintiff's capital so employed was $15,703,215.00, and further found that the sum of $15,773.22 was the amount of the franchise tax due by the plaintiff to the State of Alabama under said act, and that the sum of $7,886.60 was due to the county as a tax under said act, and that said sums aggregate the sum of $23,659.82, which said sum he, as Judge of Probate, demanded of the plaintiff and declined to receive of the plaintiff any smaller sum.

And the plaintiff avers that it owned and operated in said business in said state many millions of dollars of railroad and a large amount of equipment and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn, with said property, the costs of operating the same, and the value of said property would thereby be ruined and rendered almost valueless. And plaintiff avers that under duress, and because of the provisions of said act of the legislature providing for said tax, whereby plaintiff was and is, upon its failure to pay said tax within sixty days after the same became due, prohibited from doing any business in the State of Alabama not constituting interstate commerce and from maintaining or demanding any action in any of the courts of the State of Alabama upon a contract made in said state other than contracts based upon interstate commerce, and because of other penalties for its failure or refusal to pay said taxes with which it was threatened, the plaintiff paid to the defendant, under protest the said sum of $23,659.82 by the defendant demanded, although there was not due upon said franchise tax more than the sum of $4,732.17.

And the plaintiff avers that immediately upon the payment of said sum to the defendant, it notified him that the amount so demanded and paid was excessive, and that suit would, within a reasonable time, be brought against him to recover the same, and not to pay over said sum to the authorities of the State of Alabama until the rights of the plaintiff in said matter could be adjudicated. Copies of the said statement and of said protest and notice of suit are hereinafter set out as parts of this complaint marked Exhibits "A," "B" and "C," and are here referred to and made parts of this count

Plaintiff further avers that defendant still has possession of the money paid to him as aforesaid.

Eighth Count.

8. Plaintiff, a corporation, claims of the defendant the further sum of $13,254.96, money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum, with interest thereon, is still due and unpaid, and is the property of the plaintiff. Said money was demanded and received from the plaintiff by the defendant as the Judge of the Probate Court of Montgomery County, as a franchise tax that the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto, a foreign corporation doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its first Vice-President and Secretary to make a written statement under oath to the defendant, as the Judge of the Probate Court of Montgomery County, said County being
42 one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock and the actual amount of capital employed in the State of Alabama, by which said statement it was shown that the actual amount of the capital stock employed by the plaintiff in the State of Alabama was $4,295,950.77, and thereupon the defendant, as such Judge of the Probate Court of Montgomery County, swore and examined one of the plaintiff's officers as to the amount of the capital of the plaintiff actually employed in the State of Alabama, and in and by such examination of such officer, the following facts were shown and are true, viz.: That the par value of the entire capital stock of the plaintiff was $60,000,000.00; that of the capital stock of said company 19.17% was employed in the State of Alabama, making the par value of the plaintiff's capital stock so employed in Alabama on said basis $11,502,000.00, and that of said sum $282,605.19 was invested in railroad property in the State of Alabama owned by domestic corporations whose earnings were, however, included in the gross earnings of plaintiff in Alabama, making the par value of plaintiff's capital stock invested in Alabama other than in railroad property owned by domestic corporations, $11,219,394.51, and that the market value of one share of the capital stock of the plaintiff on January 2, 1908, was $92.125, and that the actual amount of plaintiff's capital employed in the State of Alabama upon such basis and at said market value was $10,335,867.19.

The plaintiff further avers that the defendant, as such Judge of Probate, further found that the said amount of capital so employed

by the defendant in the State of Alabama did not constitute the true basis for determining the actual amount of capital employed by the plaintiff in the State of Alabama within the meaning of the said act of the Legislature of the State of Alabama, and that the value of all of the plaintiff's tangible property employed in the State of Alabama without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of said act; and, as is a fact, that upon that basis the amount of the plaintiff's capital so employed was $15,704,215.00, and further found that the sum of $15,773.22 was the amount of the franchise tax due by the plaintiff to the State of Alabama under said act, and that the sum of $7,886.60 was the amount of such tax due to the county, and that said sums aggregate the sum of $23,659.82, which said sum he, as such Judge of Probate, demanded of the plaintiff and declined to receive of the plaintiff any other smaller sum.

And plaintiff avers that it owned and operated in said business in said state many millions of dollars of railroad, and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered almost valueless. And plaintiff avers that under duress, because of the provisions of said act of the Legislature providing for said tax, whereby plaintiff was and is, upon its failure to pay said taxes within sixty days after the same became due, prohibited from doing any business in the State of Alabama not constituting interstate commerce and from maintaining or demanding any action in any of the courts of the State of Alabama upon a contract made in said state other than contracts based upon interstate commerce, and because of other penalties for its failure or refusal to pay said taxes with which it was threatened, the plaintiff paid to the defendant under protest the said sum of $23,659.82 by the defendant demanded, although there was not due upon said franchise tax more than the sum of $10,404.86.

And the plaintiff avers that immediately upon the payment of said sum to the defendant, it notified him that the amount so demanded and paid was excessive and that suit would, within a reasonable time, be brought against him to recover the same and not to pay over said sum to the authorities of the State of Alabama until the rights of the plaintiff in said matter should be adjudicated. And plaintiff further avers that the defendant still had possession of said money paid to him as aforesaid. The said statement made to the defendant and said protest and notice are hereinafter set out in this complaint as Exhibits "A," "B" and "C," and are here referred to and made part of this count.

Ninth Count.

9. Plaintiff, a corporation, claims of the defendant the further sum of $12,371.13, money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum, with interest thereon, is still due and unpaid, and is the property of the

plaintiff. Said money was demanded and received from the plaintiff by the defendant as the Judge of the Probate Court of Montgomery County as a franchise tax that the defendant, as such Judge, claimed to be due by the plaintiff under an act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax."

And the plaintiff avers that it is and was, on the 28th and 29th days of February, 1908, and for a long time prior thereto, a foreign corporation doing both an interstate and an intrastate railroad business in the State of Alabama, and that on the 28th day of February, 1908, it caused its first Vice-President and Secretary to make a written statement under oath to the defendant, as the Judge of the Probate Court of Montgomery County, said county being one in which the plaintiff had a resident agent, showing the name of the plaintiff corporation, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock and the actual amount of capital employed in the State of Alabama, by which said statement it was shown that the actual amount of the capital stock employed by the plaintiff in the State of Alabama was $4,295,950.77, and thereupon the defendant, as such Judge of the Probate Court of Mont-
45 gomery County, swore and examined one of the plaintiff's officers as to the amount of the capital of the plaintiff actually employed in the State of Alabama, and in and by such examination of such officer, the following facts were shown and are true, viz.: That the par value of the entire capital stock of the plaintiff was $60,000,000.00; that of the capital stock of said company 19.17% was employed in the State of Alabama, making the par value of the plaintiff's capital stock so employed in Alabama on said basis $11,502,000.00, and that of said sum $282,605.49 was invested in railroad property in the State of Alabama owned by domestic corporations whose earnings were, however, included in the gross earnings of the plaintiff in Alabama, making the par value of plaintiff's capital stock invested in Alabama other than in railroad property owned by domestic corporations, $11,219,394.51, and that the actual amount of plaintiff's capital employed in the State of Alabama upon such basis and at said par value was $11,219,394.51.

The plaintiff further avers that the defendant, as such Judge of Probate, further found that the said amount of capital so employed by the defendant in the State of Alabama did not constitute the true basis for determining the actual amount of capital employed by the plaintiff in the State of Alabama within the meaning of the said act of the Legislature of the State of Alabama, and that the value of all of the plaintiff's tangible property employed in the State of Alabama without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of said act; and, as is a fact, that upon that basis the amount of the plaintiff's capital so employed was $15,704,215.00, and further found that the sum of

$15,773.22 was the amount of the franchise tax due by the plaintiff to the State of Alabama under said act, and that the sum of $7,886.60 was the amount of such tax due to the county, and that said sums aggregate the sum of $23,659.82, which said sum he, as such judge of probate, demanded of the plaintiff and declined to receive of the plaintiff any other smaller sum.

46 And plaintiff avers that it owned and operated in said business in said State many millions of dollars of railroad and a large amount of equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property, the costs of operating the same and the value of said property would thereby be ruined and rendered almost valueless. And plaintiff avers that under duress, because of the provisions of said act of the Legislature providing for said tax, whereby plaintiff was and is, upon its failure to pay said taxes within sixty days after the same became due, prohibited from doing any business in the State of Alabama not constituting interstate commerce and from maintaining or demanding any action in any of the courts of the State of Alabama upon a contract made in said state other than contracts based upon interstate commerce, and because of other penalties for its failure or refusal to pay said taxes with which it was threatened, the plaintiff paid to the defendant under protest the said sum of $23,659.82 by the defendant demanded, although there was not due upon said franchise tax more than the sum of $11,288.39.

And the plaintiff avers that immediately upon the payment of said sum to the defendant, it notified him that the amount so demanded and paid was excessive and that suit would, within a reasonable time, be brought against him to recover the same and not to pay over said sum to the authorities of the State of Alabama until the rights of the plaintiff in said matter should be adjudicated. And plaintiff further avers that the defendant still has possession of said money paid to him as aforesaid. The said statement made to the defendant and said protest and notice are hereinafter set out in this complaint as Exhibits "A," "B" and "C," and are here referred to and made part of this count.

As a part of each of Counts 3, 4, 5, 6, 7, 8 and 9 of this Complaint, the plaintiff avers that the statement made by it to
47 the defendant as Judge of Probate referred to in said court is as follows:

EXHIBIT "A."

To the Judge of Probate, Montgomery County, State of Alabama:

The Louisville & Nashville R. R. Co., a corporation organized under the laws of Kentucky, under protest and duress, files the following statement under an Act approved March 7, 1907, entitled an Act to "Provide for the revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax."

The name of the corporation is The Louisville & Nashville Rail

road Co.; that it was incorporated under the laws of Kentucky; that its principal place of business and where it has a resident agent in the State of Alabama is Montgomery in Montgomery County, Alabama; that the total amount of its capital stock is $60,000,000.00; that the actual amount of its capital employed in the State of Alabama is $4,295,950.77.

W. L. MAPOTHER,
First Vice-President.

J. H. ELLIS, *Secretary.*

[CORPORATE SEAL.]

Sworn to and subscribed before me by the said Mapother this 26th day of February, 1908, as witness my seal of office.

G. W. OLMSTEAD,
Notary Public, Jefferson County, Ky.

My commission expires January 29, 1910.

Sworn to and subscribed before me by said Ellis this 28th day of Feb'y, 1908.

J. B. GASTON,
Judge of Probate.

48 As part of each of Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of this Complaint, plaintiff avers that the protest, made by it when paying the franchise tax demanded by the defendant as Judge of Probate, is as follows, viz:

EXHIBIT "B."

MONTGOMERY, ALABAMA, *February* 29, 1908.

Honorable John B. Gaston, Judge of Probate, Montgomery County, Montgomery, Alabama.

DEAR SIR: You having assessed the amount of the capital of the Louisville & Nashville Railroad Company employed in the State of Alabama at $15,704,215.00, and having fixed or assessed against it the sum of $15,773.22 as the franchise tax payable to the State of Alabama, and the sum of $7,886.60 as the franchise tax payable to the county, all under the act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax," and you having demanded the payment thereof by said Louisville & Nashville Railroad Company: Now, therefore, solely because of the penalties that said company would incur by a failure to pay said sum within sixty days after the same becomes due, if said act be held to be valid, and because by reason thereof said company's property and business in the State of Alabama would be ruined and rendered almost valueless, should it fail to pay the taxes provided by said act and said act be held to be valid and because said Company is not willing to incur the risk of such

ruinous consequences, it now hereby pays said sum to you under protest which it hereby makes; that said act is in conflict with the Constitution of the United States and of the State of Alabama
49 and, for that and other reasons, void, and that the second section of said act is unconstitutional and void for further and additional reasons, and further that the principle and basis upon which you have assessed said taxes both for the State of Alabama and for county purposes is erroneous and the several amounts thereof excessive and illegal, and that the demand which you have made therefor is likewise illegal. And said Company hereby notifies you that it will, within a reasonable time, sue in a court of competent jurisdiction for the recovery of said sum so paid to you.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By H. L. STONE,
GREGORY L. SMITH, *Its Attorneys.*

I hereby acknowledge service of the original of which the foregoing is a copy, this the 29th day of February, 1908.

J. B. GASTON,
Judge of Probate.

As part of each of Counts 1, 2, 3, 4, 5, 6, 7, 8 and 9 of this complaint, the plaintiff avers that the notice given by it to the defendant as Judge of Probate, after paying the franchise tax demanded by him, referred to in said count is as follows:

EXHIBIT "C."

MONTGOMERY, ALABAMA, *February* 29, 1908.

Honorable John B. Gaston, Montgomery, Ala.

DEAR SIR: Notice is hereby given to you that the Louisville & Nashville Railroad Company claims that the sum of $23,659.22 this day paid to you as the Judge of the Probate Court of Montgomery County under protest, but in compliance with your demand, as State and County franchise tax provided to be paid by an Act of the Legislature of the State of Alabama, approved March 7, 1907,
50 entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax" was so paid to you under duress.

You will further take notice that the act under which said tax was assessed by you and under which you made demand for the payment thereof is unconstitutional and void in whole as violative of the Constitution both of the United States and of the State of Alabama, and that the second section of said act is for further and additional reasons unconstitutional and void.

You will further take notice that the basis and principle upon which said tax was by you assessed and the amount by you fixed is erroneous, and that the amount demanded by and paid to you is excessive, even if said act is valid.

The Louisville & Nashville Railroad Company will, within a reasonable time, bring suit against you to recover the money so paid to you, and you are hereby further notified not to pay over said money so paid to you by the Louisville & Nashville Railroad Company to the State of Alabama, or to any other person until the right of the Louisville & Nashville Railroad Company to recover the same, or some part thereof, shall have been judicially determined by some court of final resort having jurisdiction of said matters.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By H. L. STONE,
GREGORY L. SMITH, *Its Attorneys.*

I hereby acknowledge service of the original of which the foregoing is a copy, this the 29th day of February, 1908.

J. B. GASTON,
Judge of Probate.

51 As part of the second and third counts of this complaint, plaintiff avers that the statement referred to in said counts as Exhibit "D" is as follows:

EXHIBIT "D."

Statement Showing the Assessed Valuation of the Tangible Property of the Following-named Divisions of the Louisville & Nashville Railroad Company in the State of Alabama for the Tax Year 1907.

State Board's Assessment of Roadbed, Tracks, and Rolling Stock.

Alabama & Florida Division (Including Yellow River R. R.)	$1,066,440.00
Alabama Mineral Division	1,830,080.00
Birmingham Mineral Division	3,335,545.00
Myrtlewood Branch	504,915.00
Mobile & Montgomery Division	4,064,580.00
Montgomery & Prattville Division	69,695.00
Nashville, Florence & Sheffield Division	200,870.00
New Orleans Division	730,380.00
North Alabama Branch	287,800.00
Pensacola Division	4,920.00
Southern Alabama Division	1,169,670.00
Total	$13,264,895.00
Assessment of depots, section houses, real estate, tools, etc., by county authorities, applying to above-named divisions	957,107.00
Total	$14,222,002.00

52 Add:

State Board's Assessment of the main and side tracks and rolling stock of the Nashville & Decatur Railroad, Louisville & Nashville Railroad Company, Lessee	720,200.00
Assessment of depots, section houses, etc., of said Nashville & Decatur Railroad, by County Authorities	8,650.00
Assessed valuation of rolling stock owned by L. & N. R. R. Co. and used by South & North Ala. R. R. and assessed with the tracks, etc., of the South & North Ala. R. R. Co. (This does not include the rolling stock owned by the South & North Ala. R. R. Co., which is also assessed with its tracks)	753,363.00
Aggregate	$15,704,215.00

I hereby certify that the foregoing is a correct statement of the assessed valuations of the property referred to for State Taxation for the year 1907.

J. B. JONES,
Tax Agent for L. & N. R. R. Co.

As part of the second and third counts of this complaint, plaintiff avers that the statement referred to in said counts as Exhibit "E" is as follows:

EXHIBIT "E."

Statement Showing Assessed Values for State Taxation for the Year 1907, by County Authorities, of the Local Property of the L. & N. R. R. Co. in the State of Alabama used for Railroad Purposes, by Divisions and Counties.

(Does not include Land Grant Lands, Rail Leases, etc.)

53

Alabama & Florida Division.

(Including Yellow River Branch.)

Butler County	$1,900.00
Coffee County	800.00
Covington Co. (A. & F.)	12,270.00
Covington Co. (Y. R.)	300.00
Geneva County	6,240.00
Total	$21,510.00

Alabama Mineral Division.

Calhoun County	$29,580.00
Etowah County	7,360.00
Shelby County	3,750.00
Talladega County	12,700.00
Total	$53,390.00

Birmingham Mineral Division & North Alabama Branch.

Bibb County	$475.00
Blount County	3,705.00
Etowah County	6,020.00
Jefferson County	29,495.00
Shelby County	2,000.00
Tuscaloosa County	4,800.00
Total	$46,495.00

Myrtlewood Branch.

Dallas County	$7,900.00
Marengo County	7,950.00
Total	$15,850.00

54 Mobile & Montgomery Division.

Baldwin County	$8,220.00
Butler County	11,435.00
Conecuh County	5,440.00
Escambia County	13,420.00
Lowndes County	6,354.00
Mobile County	9,140.00
Montgomery County	171,530.00
Total	$225,539.00

Montgomery & Prattville Division.

Autauga County	$1,020.00
Elmore County	1,060.00
Total	$2,080.00

Nashville, Florence & Sheffield Division.

Colbert County	$12,000.00
Lauderdale County	6,900.00
Total	$18,900.00

New Orleans Division.

Mobile County	$303,123.00

Pensacola Division.

Escambia County	$400.00

55 Southern Alabama Division.

Conecuh County	$1,000.00
Dallas County	6,700.00
Escambia County	2,900.00
Monroe County	8,570.00
Wilcox County	8,800.00
Total	$27,970.00

Nashville & Decatur Division.

Limestone County	$8,650.00

"Main Stem."

Morgan County	$240,000.00

This covers the Shops, Tools, Machinery, etc., at New Decatur. The aggregate of the above valuations is $963,907.00.

GREGORY L. SMITH,
H. L. STONE,
GEO. W. JONES,
J. M. FOSTER,
Attorneys for Plaintiff.

We acknowledge ourselves security for costs in this case. March 27th, 1908.

GREGORY L. SMITH
GEO. W. JONES.

Filed in office March 27th, 1908.

H. N. HUGHES, *Clerk.*

Received in office March 27th, 1908.

HORACE HOOD, *Sheriff.*

Executed by serving a copy of the within on John B. Gaston, this March 28th, 1908.

HORACE HOOD,
Sheriff Montgomery County.
Per A. J. TAYLOR, *D. S.*

Motion to Allow Amendments to Complaint.

In the City Court of Montgomery.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

Comes the Louisville & Nashville Railroad Company, and shows to the Court that on the 31st day of August, 1908, it filed in this

cause two amendments to the complaint in said cause, said amendments being marked "Amendment No. 1" and "Amendment No. 2."

Said Amendments were filed subject to allowance, and said Louisville & Nashville Railroad Company hereby moves that said amendments be allowed to be filed as amendments to the original complaint in this cause.

Dated this the 31st day of August, 1908.

GREGORY L. SMITH,
GEO. W. JONES,
H. L. STONE,
J. M. FOSTER,
Attorneys for Plaintiff.

To Hon. Alex. M. Garber, Attorney General; Hon. S. D. Weakley, Hon. H. C. Selheimer, attorneys for defendant.

Filed Aug. 31, 1908.

H. N. HUGHES, *Clerk.*

Received in office Aug. 31, 1908.

HORACE HOOD, *Sheriff.*

57 Executed by service of a copy of the within on Alexander M. Garber, Attorney General for the State of Alabama, this the 1st Sept., 1908.

HORACE HOOD, *Sheriff.*
W. D. HALL, *D. S.*

Amendment No. 1.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
JOHN A. GASTON.

Comes the Plaintiff, and, by leave of the court first had, amends its complaint in said cause:

First. By adding to the third count of the complaint, at the end of its allegations in regard to the purchase of the Nashville, Florence & Sheffield Railway Company, which allegations are numbered 8, the following:

For a long time prior to, and at the time of, the said sale and conveyances of said railroad to the plaintiff, the plaintiff owned and operated a railroad from Nashville, in the State of Tennessee, to Decatur, in the State of Alabama, which railroad connected at Columbia, Tennessee, with the said railroad so purchased and conveyed to it by the Nashville, Florence & Sheffield Railway Company.

8½. The plaintiff avers that the Sheffield and Tuscumbia Railway, which extends from a point in Sheffield to a point in Tuscumbia, was organized under the name of the Sheffield & Tuscumbia Street Railway Company as a street railroad under the general incorporation laws of the State of Alabama on November 26, 1886. By an Act of the General Assembly of Alabama, approved February

26, 1887, said Company was empowered to extend its railroad from Sheffield to Tuscumbia, and by an Act of the General Assembly of Alabama, approved February 18, 1895, the name of said company was changed to the Sheffield & Tuscumbia Railway Company, and the power to operate as a common carrier steam railroad was conferred upon it. By a deed dated March 9, 1896, the said Sheffield & Tuscumbia Railway Company conveyed all of its property rights and franchises, except the right to exist as a corporation, to the plaintiff the Louisville & Nashville Railroad Company, and plaintiff avers that at and before the time of said conveyance to it, the Louisville & Nashville Railroad Company, the line of the railroad of the Sheffield & Tuscumbia Railway Company was connected with the line of the railroad owned by the plaintiff extending from Columbia, Tennessee, to Sheffield, Alabama.

Second. By striking from the third count of the complaint the following words as the same appear just preceding the quotation of Section 1169 of the Code of Alabama, viz.: "And has, ever since its enactment, remained in full force and effect."

And by inserting just after the quotation of Section 1169 of the Code the following: "Said act was thereafter amended by the Legislature of the State of Alabama by an Act approved February 7th, 1899, so as to read as follows:

"An Act to Amend Section 1169 of the Code.

SECTION 1. Be it enacted by the General Assembly of Alabama, that Section 1169 of the Code, shall be, and the same is hereby amended so as to read as follows, viz.: 1169. 'Domestic may sell its property and franchise to foreign corporation. Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, road bed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another State, owning or operating by lease or otherwise, any railroad in this State, to purchase at judicial sale or otherwise, or to lease and to hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock or of the property, road beds, rights and franchises of any railroad corporation of this State, with those railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either directly, or by means of an intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad, so purchased or leased, shall be in all respects, subject to the laws of this State as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized.'

Approved February 7th, 1899."

Third. By inserting in the third count of the original complaint the following just preceding the following language in said count, "The plaintiff avers that the defendant is the Judge of the Probate Court of Montgomery County, Alabama, and that on the 29th day of February, 1908, and for many years prior thereto, the plaintiff had a resident agent in the City of Montgomery, in said County, and the defendant, as Judge aforesaid, demanded of the plaintiff payment of the so-called franchise tax provided for by said Act of March 7, 1907, hereinbefore referred to and complained of," viz.:

In and by the several charters of the Railroad Companies the properties and franchises of which plaintiff purchased or leased as hereinbefore in this count alleged, the right was conferred and the duty imposed upon said companies to receive and transport, for hire or compensation, over their respective railroads as public highways, and by said companies, as common carriers, passengers and freight tendered to them respectively for transportation from points in the State of Alabama to other points within said State, and between points in the State of Alabama and points in other States, and to receive and transport freight and passengers and cars, loaded or empty from other railroads doing business in Alabama which were being transported from one point in the State of Alabama to another point in said State, and also freight and passengers and cars loaded
60 or empty of other railroads being transported between points in the State of Alabama and points in other states; and in and by the purchases or leases of said railroad properties and franchises hereinabove alleged, the plaintiff acquired said rights to so receive and transport such freight, passengers and cars, and it became its duty to so receive and transport the same, and plaintiff, under the contract created by or arising out of said purchases or leases, owned and possessed and still owns and possesses the rights and franchises to so receive and transport such freight, passengers and cars, and has ever since been and still is subject to the duty and obligation to receive and transport the same; and plaintiff, by the purchases and leases of said railroad properties and franchises, became and has ever since remained obligated to operate the said railroads as common carriers of passengers and freight and cars, and is still so obligated and bound to operate the same.

In and by Section 242 of the Constitution of Alabama, it is provided as follows:

"242. All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this State, and connect at the State line, with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers and cars, loaded or empty, of the others, without delay or discrimination."

Said provisions were also contained in the Constitution of Alabama of 1875.

Said provisions of the Constitution of Alabama were made operative by Section 3459 of the Code of Alabama of 1896, which reads as follows:

"3459 (1158). Railroads Public Highways.—The main
61 track of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad."

And said constitutional provisions are still made operative by section 5520 of the Code of Alabama of 1907, which reads as follows:

"5520. Railroads and Common Carriers Defined.—All railroads are public highways, and all corporations, companies, firms, or individuals engaged in the transportation of persons or freight over railroads for hire are common carriers."

By Section 5549 of the Code of 1907, it is further provided as follows:

"5549. Reception and Transportation of Freight and Cars Required and Provided For.—Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever tendered at a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law or the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and shall forward the same without delay and within a reasonable time to the point of destination, under and in compliance with such reasonable rules, regulations and requirements as may be prescribed by the railroad commission or by law, and upon the failure of any such railroad company or other common carrier doing business in this state to so receive and so transport goods, merchandise, or property of any description, delivered to it for shipment to and from any points within the state in such reasonable time as the railroad commission, or the law may prescribe unless otherwise agreed upon between the *the* shipper and the company, or unless such property be burned, stolen, or otherwise destroyed, such railroad com-
62 pany or other common carrier shall forfeit to the party aggrieved such sum as may now or hereafter be prescribed by law for such delay, and, in addition, shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport."

Plaintiff further avers that under Section 242 of the Constitution of Alabama, and under said several provisions of the Code of Alabama, it cannot, with its railroad or railroads in Alabama, engage in the transportation of freight and passengers between points in the State of Alabama and points in other states, and yet decline to receive and transport as part of its common carrier business, freight and passengers from points in the State of Alabama to other points in the State of Alabama, but is obligated, by its purchases and leases of other railroads and franchises from corporations organized under the laws of Alabama and by said constitutional and statutory pro-

visions to receive and transport freight and passengers between points in the State of Alabama as part of its general business as a common carrier. It is engaged in and under said laws it is obligated to engage in, one inseparable business in the State of Alabama, consisting of the transportation of interstate and intrastate freight and passengers; that both said interstate and intrastate freight and passengers are transported under and are required by the Constitution and laws of Alabama to be transported under indivisible franchises and rights and with the same property, and that the tax imposed by the act of the Legislature of the State of Alabama, approved March 7, 1907, entitled "An Act to provide for the revenue of the state by requiring all foreign corporations authorized to do business in this state, under the laws of the State of Alabama, to pay an annual franchise tax," and the collection of which, for the year 1908, is here complained of, is a tax upon such indivisible business and constitutes, and is, a regulation of and a direct burden upon the interstate commerce that plaintiff is engaged in, and constitutes an interference with the powers of Congress to regulate commerce
63 among the several states, and said act, because thereof, interferes with powers of Congress conferred by Section 8 of Article 1 of the Constitution of the United States, and is void, and the plaintiff here claims protection under said section eight of Article 1 of the Constitution of the United States against the burden imposed by said act upon the commerce among the several states in which it is engaged as aforesaid.

Fourth. By adding to said Complaint the following additional counts:

Count A.

A. The plaintiff claims of the defendant the further sum of one thousand, six hundred and thirty-one and 92-100 Dollars ($1631.92) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon is still unpaid, and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of twenty-three thousand, six hundred and fifty-nine and 82-100 Dollars ($23,659.82) that was based and assessed upon that portion of the plaintiff's capital actually employed in the State of Alabama, which was and is invested by the plaintiff in the railroad property which it purchased from the Alabama and Florida Railroad Company. The said Alabama and Florida Railroad Company was duly incorporated and organized August 23, 1898, under the laws of Alabama; plaintiff, at the time of the organization of said company, was and still is, the owner of its entire capital stock; and on December 17, 1900, said Company sold and conveyed to plaintiff, by a deed of record, all of its property and franchises, including 32.67 miles of main line of railroad in the State then in operation, and 44.90 miles of main line railroad then in the course of construction in Alabama, and which has since been finished and put into operation. The assessed value of the road-bed, track and equipments of the Alabama & Florida Railroad Company in 1907 was $1,066,440.00, and the assessed value of the local property thereon, and belonging thereto was

$21,500.00 and of the said franchise tax collected of the plaintiff as aforesaid, the said sum of one thousand, six hundred and thirty-one and 92-100 Dollars ($1,631.92) was based assessed upon the said assessed value of said property aggregating million and eighty-seven thousand, nine hundred and fifty dol- ($1,087,950.00).

Plaintiff further avers the several matters set out at the end of amendment under the heading of "Allegations Common to nts A, B, C, D, E, F, G, H, I, J, K and L."

Count B.

. The plaintiff claims of the defendant the further sum of two usand, eight hundred and twenty-five and 10-100 Dollars ,825.10) for money, on the 29th day of February, 1908, received he defendant to the use of the plaintiff, which sum of money with rest thereon is still unpaid and is the property of the plaintiff. e money here sued for is the proportion of the franchise tax of nty-three thousand, six hundred and fifty-nine and 82-100 Dol- ($23,659.82) that was based and assessed upon that portion of plaintiff's capital actually employed in the State of Alabama ch was and is invested by the plaintiff in the railroad property ch it purchased from the Alabama Mineral Railroad Company he 29th day of September, 1903, by a deed of record. The Ala- a Mineral Railroad was a corporation duly incorporated and anized on July 28, 1890, under the laws of Alabama. At the of the organization of said Company, the plaintiff, the Louis- & Nashville Railroad Company was, and still is, the owner of its re capital stock, and on September 29, 1903, said Company sold conveyed to the plaintiff, by deed of record, all of its property franchises, including 132.31 miles of main line railroad in bama. The assessed value of the road-bed and track and equip- nts of the said Alabama Mineral Railroad Company in 1907 was million, eight hundred and thirty thousand and eighty dollars ,830,080.00), and the assessed value of the local property thereon belonging thereto for the same year was fifty-three thousand, e hundred and ninety dollars ($53,390.00). And of the said franchise tax collected of the plaintiff as aforesaid, the said sum of two thousand, eight hundred and twenty-five and 10-100 Dollars ($2825.10) was based and assessed upon the assessed value of said property, aggregating $1,883,470.00.

laintiff further avers the several matters set out at the end of amendment under the heading of "Allegations common to nts A, B, C, D, E, F, G, H, I, J, K and L."

Count C.

. The plaintiff claims of the defendant the further sum of five usand, five hundred and four and 76-100 Dollars ($5,504.76) money, on the 29th day of February, 1908, received by the de- dant to the use of the plaintiff, which sum of money with interest eon, is still unpaid and is the property of the plaintiff. The

money here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of the plaintiff's capital actually employed in the State of Alabama which was and is invested by the plaintiff in the railroad property which it purchased from the Birmingham Mineral Railroad Company. The Birmingham Mineral Railroad Company was duly incorporated and organized March 19, 1884, under the laws of Alabama, and the plaintiff, at the time of such organization of said Company was and still is the owner of its entire capital stock, and on January 11, 1904, said Company sold and conveyed to the plaintiff, by deed of record, all of its property and franchises, including 169.80 miles of main line railroad in Alabama. The assessed value of the road-bed track and equipment of the said Birmingham Mineral Railroad Company in 1907 was $3,623,345.00, and the assessed value of the local property thereon and belonging thereto for the same year was $46,495.00. This assessment includes the property acquired from the Oneonta & Attalla Railroad Company, which said company was duly incorporated and organized under the laws of Alabama on June 23, 1900. At the time of the organization of said Company, plaintiff was and still is the owner of its entire capital stock, and on December 15, 1900, said Company sold and conveyed to the plaintiff, by deed of record 11.3 miles of its main line railroad,
66 and on September 23, 1905, further sold and conveyed to plaintiff, by deed of record, 15.6 miles of its main line of railroad.

There is also included in said assessment of the Birmingham Mineral Railroad, and as a part thereof, the property formerly belonging to the North Alabama Railroad Company which was duly incorporated and organized on March 17, 1900, under the laws of Alabama. At the time of the organization of said Company, plaintiff was, and still is, the owner of its entire capital stock, and on December 15, 1900, said Company sold and conveyed to the plaintiff, by deed of record, its Brookwood Branch, being 3.4 miles of its main line railroad, and on May 1, 1905, said Company sold and conveyed to the plaintiff, by a deed of record, the remainder of its property and franchises, including 32.205 miles of main line railroad.

Of the said franchise tax collected of the plaintiff as aforesaid, the sum of five thousand, five hundred and four and 76-100 Dollars ($5,504.76) was based and assessed upon the said assessed values of said property, aggregating $3,669,840.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count D.

D. The plaintiff claims of the defendant the further sum of seven hundred and eighty-one and 14-100 Dollars ($781.14) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon is still unpaid, and is the property of the plaintiff. The money

here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of the plaintiff's capital actually employed in the State of Alabama, which was and is invested by the plaintiff in the railroad property purchased from the Birmingham, Selma & New Orleans Railroad Company. The Birmingham, Selma & New Orleans Railroad Company was duly incorporated and organized November 16, 1886, under the laws of Alabama, and plaintiff, on September 10, 1900, became the
67 owner of its entire capital and has ever since been the owner thereof, and on April 21, 1902, said Company sold and conveyed to the plaintiff all of its property and franchises, including 60.3 miles of main line railroad in Alabama known as the Myrtlewood Branch. The assessed value of the road-bed track and equipment of the said Myrtlewood Branch in 1907, was $504,915.00, and the assessed value of the local property thereon and belonging thereto, for the same year, was $15,850.00, and of said franchise tax collected of the plaintiff as aforesaid, the said sum of $781.14 was based and assessed upon the said assessed value of said property aggregating $520,765.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count E.

E. Plaintiff claims of the defendant the further sum of one hundred and seven and 65-100 dollars ($107.65) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. The money sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon the portion of plaintiff's capital actually employed in the State of Alabama, which was and is invested by the plaintiff in the railroad property which it purchased from the Montgomery & Pratville Railroad Company. The Montgomery & Pratville Railroad Company was duly incorporated and organized March 29, 1895, under the laws of Alabama. At the time of such organization, the plaintiff owned and still owns the entire capital stock of said Company, and on March 9, 1896, and June 3, 1896, said Company sold and conveyed to plaintiff, by a deed of record, all of its property and franchises, including 10.35 miles of main line railroad in Alabama. The assessed value of the road-bed track and equipment of the said Montgomery & Prattville Railroad Company
68 in 1907 was $69,695.00, and the assessed value of the local property thereon and belonging thereto, for the same year, was $2080.00. And of the said franchise tax collected of the plaintiff as aforesaid, the sum of $107.65 was based and assessed upon the said assessed value of said property, aggregating $71,775.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count F.

F. The plaintiff claims of the defendant the further sum of six thousand, four hundred and thirty-five and 16-100 Dollars ($6,435.16) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon is still unpaid, and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of plaintiff's capital actually employed in the State of Alabama, which was and is invested by the plaintiff in the property which it purchased from the Mobile & Montgomery Railroad Company. The Mobile & Montgomery Railroad Company was a corporation under the laws of Alabama, and was created and organized as follows: By an act of the Legislature of Alabama, approved February 14, 1850, the Alabama & Florida Railroad Company was incorporated, and the charter thereof was subsequently amended by the several acts of the Legislature of Alabama, approved, respectively, February 16, 1854, and February 20, 1854.

By an Act of the Legislature of the State of Alabama, approved February 15, 1857, the Mobile & Great Northern Railroad Company was incorporated, and the same thereafter amended by an Act of the Legislature of the State of Alabama, approved February 8, 1858. The two corporations were consolidated into one Company under the name and style of the Mobile & Montgomery Railroad Company under powers conferred upon it by an Act of the Legislature of Alabama, approved August 5, 1868, amended by an
69 Act of the Legislature of Alabama, approved December 28, 1868. By and under the terms of said act of consolidation, the said Mobile & Montgomery Railroad Company owned and possessed all of the rights and franchises conferred upon the Alabama & Florida Railroad Company, and the Mobile & Great Northern Railroad Company, under and by virtue of their said several charters.

Plaintiff further avers that under the charter of the said Alabama & Florida Railroad Company and of the said Mobile & Great Northern Railroad Company, said companies had the power and perpetual franchise to construct and operate a railroad between the City of Montgomery and the City of Mobile, and did so construct and operate said railroad, and the railroad so constructed and operated by them was, by said act of consolidation, obtained by and became the property of the Mobile & Montgomery Railroad Company, which said Company thereafter operated said railroad under said perpetual franchise. The Mobile & Montgomery Railroad Company had the power and authority, under its said charter, to mortgage all of its property rights and franchises, and, under and pursuant to said power it did mortgage all of its property rights and franchises by a deed of trust executed to Philo C. Calhoun, Timothy Porter and Josiah Morris on the 25th day of February, 1870, to secure certain bonds issued by it. Default was made in the payment of said deed of trust, and said deed of trust or mortgage was foreclosed and the property and franchises covered thereby sold on November 14, 1874, under a decree of the chancery court for the second district, southern

chancery division of Alabama, and purchased for the holders of the bonds secured by said deed of trust by the trustee named therein, and thereafter said purchasers organized themselves into a corporation under the name of the Mobile & Montgomery Railway Company under and pursuant to the general laws of Alabama for such cases made and provided. The conveyance of said property and franchises of the said Mobile & Montgomery Railroad Company was executed under the orders of said court to the Mobile & Mont-
70 gomery Railway Company, and said Company thereafter owned and operated said franchise, and operated said property until the 17th day of December, 1900. On and prior to said date, the plaintiff obtained and became the owner of all of the capital stock of the Mobile & Montgomery Railway Company, and with the approval of a majority in interest of its stockholders present and represented at a called meeting thereof, the plaintiff purchased all of the property and franchises of the said Mobile & Montgomery Railway Company, including 178.57 miles of main line railroad in Alabama, and at the last mentioned date obtained a conveyance to it of said property and franchises executed in due form of law by the said Mobile & Montgomery Railway Company, which said deed is of record, and the plaintiff has ever since said date owned said property and franchises, and exercised the same by operating said property as a common carrier of interstate and intrastate commerce in the State of Alabama. The assessed value of the road-bed track and equipments of the said Mobile & Montgomery Railway Company in 1907 was $4,064,580.00, and the assessed value of the local property thereon and belonging thereto for the same year was $225,539.00, and of said franchise tax collected of the plaintiff as aforesaid, the said sum of $6,534.16 was based and assessed upon the said assessed value of said property aggregating $4,290,119.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count G.

G. Plaintiff claims of the defendant the further sum of one thousand, five hundred and fifty and 25-100 Dollars ($1550.25) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that part of the
71 plaintiff's capital actually employed in the State of Alabama which was and is invested by the plaintiff in the railroad property which it purchased from the New Orleans, Mobile & Texas Railroad Company, as reorganized. The New Orleans, Mobile & Texas Railroad Company, as re-organized, was duly incorporated and organized on April 29, 1880, under the laws of Alabama, at which said time the plaintiff was and ever since has been, the owner of said company's entire capital stock. On October 5, 1881, said company sold and conveyed to plaintiff, by a deed of record, all of its property

and franchises, including 29.24 miles of main line railroad in Alabama. The assessed value of the road-bed track and equipment of the New Orleans, Mobile & Texas Railroad Company, as re-organized, in Alabama in 1907 was $730,380.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $303,123.00, and of said franchise tax collected of the plaintiff as aforesaid, the same of $1550.25 was based and assessed upon the said assessed value of said property aggregating $1,033,503.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count H.

H. The plaintiff claims of the defendant the further sum of three hundred and twenty-nine and 56-100 Dollars ($329.65) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of plaintiff's capital actually employed in the State of Alabama which was and is invested by the plaintiff in the railroad property which it purchased from the Nashville, Florence & Sheffield Railroad Company. The Nashville, Florence & Sheffield Railroad Company was duly incorporated and organized on May 13, 1887, under the laws of Alabama. At said time the entire amount of its capital stock was $682,050.00
72 of which the plaintiff had acquired, prior to the 10th day of April, 1900, $804,950.00, face values. All of the properties and franchises of said company were sold at decretal sale, dated April 10, 1900, and were purchased by the plaintiff, and on May 31, 1900, said Company's properties and franchises, including 17.19 miles of main line railroad in Alabama so purchased by the plaintiff were conveyed to it by a Special Master of the Court, having jurisdiction of the subject matter and the parties, and decreeing the sale aforesaid, and on the same date the said company sold and conveyed, by deed of record, its equity of redemption in said property and franchises to the plaintiff herein. The said sales and conveyances rendered all of the capital stock in the Nashville, Florence & Sheffield Railroad Company worthless. Plaintiff avers that for a long time prior to and at the time of said sales and conveyances of said railroad to the plaintiff, the plaintiff owned and operated a railroad from Nashville, in the State of Tennessee, to Decatur, in the State of Alabama, which railroad connected at Columbia, Tennessee with the said railroad so purchased and conveyed to it by the Nashville, Florence & Sheffield Railway Company. The assessed value of the road-bed track and equipment of said last-named railroad in Alabama in 1907 was $200,870.00, and the assessed value of the local property thereon and belonging thereto in Alabama, for the same year, was $18,900.00.

Included in said assessment, however, was the value of the property

of the Sheffield & Tuscumbia Railway. The railroad of the said Sheffield & Tuscumbia Railway extends from a point in Sheffield to a point in Tuscumbia. Said railroad was organized under the name of the Sheffield & Tuscumbia Street Railway Company as a street railroad under the general incorporation laws of Alabama on November 26, 1886. By an Act of the General Assembly of Alabama, approved February 26, 1887, said company was empowered to extend its railroad from Sheffield to Tuscumbia, and, by an act of the General Assembly of Alabama, approved February 18, 1895, the name of said company was changed to the Sheffield & Tus-
73 cumbia Railway Company, and the power to operate as a common carrier steam railroad was conferred upon it. By a deed dated March 9, 1896, the said Sheffield & Tuscumbia Railway Company conveyed all of its property rights and franchises, except the right to exist as a corporation, to the plaintiff, the Louisville & Nashville Railroad Company, and the plaintiff avers that at and before the time of said conveyance to it, the Louisville & Nashville Railroad Company, the line of railroad of the Sheffield & Tuscumbia Railway Company was connected with the line of the railroad owned by the plaintiff extending from Columbia, Tennessee, to Sheffield, Alabama. And the plaintiff avers that of said franchise tax collected of the plaintiff as aforesaid, the said sum of $529.65 was based and assessed upon the said assessed value of said property, aggregating $219,770.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count 1.

1. The plaintiff claims of the defendant the further sum of seven and 98-100 Dollars ($7.98), for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest, is still unpaid and is the property of the plaintiff. The money sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of the plaintiff's capital actually employed in the State of Alabama which was, and is, invested by the plaintiff in the railroad property which it purchased from the Pensacola Railroad Company. The plaintiff avers that the Pensacola Railroad Company was duly incorporated and organized on February 27, 1877, under the laws of Florida, and that on the 27th day of February, 1880, the plaintiff had become the owner of the entire capital stock of said company, and, on October 28, 1880, said company sold and conveyed all of its property and franchises to the plaintiff by deed of record, including one mile of main line railroad in the State of Alabama. The assessed
74 value of the roadbed track and equipment of the said Pensacola Railroad in Alabama in 1907 was $1,920.00, and the assessed value of the local property thereon belonging thereto in Alabama for the same year was $400.00, and of the said franchise tax collected of the plaintiff as aforesaid, the sum of $7.98 was based

and assessed upon the said assessed value of said property aggregating $5,320.00.

The plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations Common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count J.

J. The plaintiff claims of the defendant the further sum of one thousand, seven hundred and ninety-six and 40/100 Dollars ($1,796.40) for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which sum of money with interest thereon is still unpaid and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of $23,359.82 that was based and assessed upon that portion of the plaintiff's capital actually employed in the State of Alabama which was and is invested by the plaintiff in the railroad property which it purchased from the Southern Alabama Railroad Company. The Southern Alabama Railroad Company was duly incorporated and organized on January 21, 1899, under the laws of Alabama. At the time of said organization the plaintiff was and has ever since been the owner of its entire capital stock and on December 11, 1899, the said Southern Alabama Railroad Company sold and conveyed to the plaintiff, by deed of record, all of its property and franchises, including 109.29 miles of main line railroad in Alabama.

The Montgomery, Hayneville & Camden Railroad Company was duly incorporated and organized under the laws of Alabama on December 20, 1890. Subsequently and prior to June 7, 1900, the plaintiff became the owner of the entire capital stock of said company, and on the last mentioned date said company sold and conveyed to plaintiff, by a deed of record, all of its property and
75 franchises, including a right-of way and partially constructed road-bed a distance of about 7.5 miles in Alabama, which partially constructed road-bed thus acquired was completed and put in operation February 15, 1901, thus forming what is now known as the Camden Branch of said Southern Alabama Railroad. The assessed value of the road-bed track and equipment of the said Southern Alabama Railroad (including said Camden Branch), in 1907 was $1,169,670.00, and the assessed value of the local property thereon and belonging thereto for the same year was $27,970.00, and of the said franchise tax collected of the plaintiff as aforesaid, the said sum of $1796.40 was based and assessed upon the said assessed value of said property aggregating $1,197,640.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count K.

K. The plaintiff claims of the defendant the further sum of one thousand, four hundred and fifty-three and 27/100 Dollars ($1453.27) for money, on the 29th day of February, 1908, received

the defendant to the use of the plaintiff, which sum of money, th interest thereon, is still unpaid, and is the property of the plain- f. The money here sued for is the proportion of the franchise x of $23,659.82 that was based and assessed upon that portion of e plaintiff's capital actually employed in the State of Alabama hich was, and is, invested by the plaintiff in the railroad property hich formerly belonged to the Tennessee & Alabama Central Rail- ad Company. The Tennessee & Alabama Central Railroad Com ny was a railroad company chartered by an act of the Legislature the State of Alabama, approved December 19, 1853, with a perpet l franchise and power and authority in and by its charter to con- uct, maintain and operate a railroad from Montgomery, in Shelby unty, in a northeastern direction, through Decatur, in Morgan unty, and across the Tennessee River at a point, thence through Athens in Limestone County, and from thence to some point on the boundary line between the State of Alabama and State of Tennessee, thence to connect with a railroad leading from laski to Columbia, Tennessee; in and by said charter the said ilroad Company had further power for the purpose of uniting h other roads, as well as to extend its road, to build and construct nch railroads not more than five miles in length on either side of l main road in any of the counties near the main road, and also l power and authority to form junctions with other railroads. Such railroad company had, under its charter, the further power l authority to unite and consolidate into one road all or any part said railroad with any other railroad that might connect with its lroad at the Tennessee line.

The said Tennessee & Alabama Central Railroad Company, under l pursuant to its said charter power and franchises, constructed ailroad from what is now known as the Memphis and Charleston nction, on or near the Tennessee River, northwardly to the Ten- see line near Veto, Alabama, and was thereafter, in the year 1856, solidated with other railroads created by and organized under the s of Tennessee, whose railroad connected with the railroad of the nessee and Alabama Railroad Company at the Tennessee line e said consolidation made and the railroad corporation formed reby is known as the Nashville & Decatur Railroad Company, and railroad extended from Nashville, in the State of Tennessee, t Memphis & Charleston Junction on the Tennessee River in the te of Alabama.

On and prior to the 18th day of October, 1899, the railroad of the intiff extended from the City of Louisville, in the State of Ken- ky, to the City of Nashville, in the State of Tennessee, and was re connected or continuous with the lines of said Nashville & De- ur Railroad Company, and on the 18th day of October, 1899, the intiff, the Louisville & Nashville Railroad Company, with the nt or approval of a majority in interest of its stockholders, present represented at a called meeting thereof, leased by written lease duly executed and of record the property and franchises of the said Nashville & Decatur Railroad Company, including 26.12 miles of main line railroad in Alabama, formerly be-

longing to the Tennessee & Alabama Central Railroad Company, for a term of 999 years, to commence on the first day of July, 1900, and the plaintiff has ever since been in possession of said railroad, its property and franchises, under said lease, and has been operating the same as a common carrier of interstate and intrastate commerce in the State of Alabama, as well as in the State of Tennessee.

The assessed value of the road-bed track and equipment of the said Nashville & Decatur Railroad in Alabama in 1907 was $720,200.00, and the assessed value of the real property thereon and belonging thereto in Alabama, including the shops, machinery, and so forth, on main stem at New Decatur, for the same year, was $248,650.00, and of the said franchise tax collected of the plaintiff as aforesaid, the sum of $1453.27 was based and assessed upon the said assessed value of said property aggregating $968,850.00.

Plaintiff further avers the several matters set out at the end of this amendment under the heading of "Allegations Common to Counts A, B, C, D, E, F, G, H, I, J, K and L."

Count L.

L. The plaintiff claims of the defendant the further sum of one thousand, one hundred and thirty and 04-100 Dollars ($1130.04), for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which said sum of money with interest thereon is still unpaid and is the property of the plaintiff. The money here sued for is the proportion of the franchise tax of $23,659.82 that was based and assessed upon that portion of plaintiff's capital actually employed in the State of Alabama which was invested by the plaintiff in rolling-stock or equipment owned by it, but used by the South & North Alabama Railroad Company, and assessed in Alabama, with the road-bed, tracks and equipment of the said South & North Alabama Railroad Company, and the plaintiff avers that the said South & North Alabama Railroad Company is a corporation duly created and organized under the laws of
78 Alabama, and operated as a common carrier of interstate and intrastate freight under the provisions of said laws.

Allegations Common to Counts A, B, C, D, E, F, G, H, I, J, K and L.

The defendant, as the Judge of the Probate Court of Montgomery County received of the plaintiff, the Louisville & Nashville Railroad Company, the sum of $23,659.82 (of which the amount here sued for is part) as a franchise tax which the defendant demanded of the plaintiff under the provisions of the Act of March 7, 1907, entitled "An Act to provide for the revenue of the State, requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax," and the plaintiff avers that said act is, in so far as it seeks to authorize a tax upon the capital employed by the plaintiff in this State in the operation of the property described in this count, unconstitutional and void, in that it impairs the obligation of the contract

ween the plaintiff and the State of Alabama in this count set out, violates section 22, Article 1, of the present Constitution of ama, and especially Section 10, of Article 1 of the Constitu- of the United States, forbidding any State passing any law iring the obligation of contracts.

nd the plaintiff avers that it is a perpetual corporation, created organized under the laws of Kentucky in the year 1850, and by the Act of the Legislature of Kentucky, approved the 6th of March, 1878, its charter was so amended as to authorize its ident and Directors, with the assent and approval of a majority nterest of the stockholders of the Company present or repre- d at an annual or called meeting thereof, to operate, lease or hase upon such terms, or in such manner as they deemed best, railroad in any other state or states deemed necessary for the protection of the interests of the stockholders.

The provisions of the first section of said act read as fol- lows:

ECTION 1. That the charter of the Louisville & Nashville Rail- Company be and is hereby so amended as to authorize its presi- and directors, with the assent or approval of a majority in in- t of the stockholders of the company present or represented at annual or called meeting thereof, to operate, lease or purchase such terms or in such manner as they deem best, any railroad ny other state, or states, deemed necessary for the protection e interests of the stockholders."

an act of the Legislature of Kentucky, approved the 27th day nuary, 1880, the charter of the plaintiff was further amended to authorize said company to purchase and hold a majority in nt of capital stock in any railroad company, or companies, ered by any other State, or States, in order to secure to the sville & Nashville Railroad Company the control in the man- ent and operation of said railroad companies in such other , or States. The first section of said act, wherein said powers onferred, reads as follows:

ECTION 1. That in addition to the power and authority con- d upon the Louisville & Nashville Railroad Company by the pproved March 6, 1878, chapter 278, entitled 'An act to amend harter of the Louisville & Nashville Railroad Company,' 'to te, lease or purchase upon such terms, or in such manner as resident and directors might deem best, any railroad in any State, or States, deemed necessary for the protection of the sts of the stockholders,' the said company shall also have the r and authority to purchase and hold a majority in amount of apital stock of any railroad company, or companies, chartered y other State in order to secure to the Louisville & Nashville oad Company the control in the management and operation as said and in such other State or States; provided, that a majority in interest of the stockholders of the company pres- ent or represented by proxies at any annual or called meeting thereof shall accept this act as an amendment to its charter."

d the plaintiff avers that said amendments to its charter were

duly accepted by a majority in interest of the stockholders of the plaintiff present and lawfully represented by proxies at a meeting or meetings of the stockholders of the plaintiff duly held for that purpose, and that the plaintiff has ever since exercised the said powers by and with the consent of its stockholders.

The plaintiff states that the Legislature of Alabama passed an Act, which was approved February 18, 1891, and was afterward incorporated as Section 1169 in the Code of Alabama of 1869, as follows:

"Domestic may sell its property and franchises to foreign corporation.—Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock all of its property, road-bed, rights and franchises; but the purchasing corporation shall keep an office and an agent in this State; and such railroad so purchased shall be, in all respects, subject to the laws of this State as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired."

By an Act of the General Assembly of Alabama approved February 7, 1899, said act was amended so as to read as follows:

"An Act to Amend Section 1169 of the Code."

"SECTION 1. Be it enacted by the General Assembly of Alabama, that Section 1169 of the Code, shall be, and the same is hereby amended so as to read as follows: 1169. 'Domestic may sell its property and franchise to foreign corporation. Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its
81 property, road bed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another State, owning or operating by lease or otherwise, any railroad in this State, to purchase at judicial sale or otherwise, or to lease and to hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock or of the property, road beds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either directly or by means of an intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad, so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized."

The plaintiff states that the Legislature of Alabama passed an Act, which was approved February 11, 1891, and was afterward incor-

porated as Section 1170 in said Code, and has ever since its enact ment remained in full force and effect, as follows:

"Aid to, or purchase and lease of other roads.—A corporation, chartered under the laws of this or any other state heretofore or hereafter created for the purpose of building, constructing or oper ating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such cor poration or company furnishing aid; or any railroad corporation organized in pursuance of the laws of this or any other State, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are con tinuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies whose 52 lines are so connected, may enter into any arrangement for their common benefit, consistent with, and calculated to pro mote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of such corporations or com panies has been called by the directors thereof at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, rep resented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

Plaintiff avers that it is a foreign corporation within the meaning of said Act, having been duly incorporated and organized under an Act of the General Assembly of the State of Kentucky, approved March 5, 1850, by which, and the amendments thereto enacted by said General Assembly March 6, 1878, and January 27, 1880, it was authorized and empowered to perpetually own, purchase, construct, lease, operate, control and maintain railroads in the State of Ken tucky, Alabama and other States, and is and has been since July , 1872, under and by virtue of the laws of the State of Alabama, engaged in the business of a common carrier railroad corporation n this State, and is and has since said date been doing both inter state and intrastate business therein.

Plaintiff further avers that it had during all of said period since July, 1872, and prior to February 29, 1908, done all that a foreign corporation was required by the Constitution and laws of Alabama o do in order to authorize it to do business in the State of Alabama, and to that end it had a known place of business, namely, Mont gomery County in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument of writing under its corporate seal and signed officially by its President and Secretary, designating a known place of business in the State of Alabama and an authorized agent residing thereat. It also paid in each year at the time prescribed by the laws of Alabama its annual license 83 tax to be paid by foreign corporations doing business in Ala bama, and had received a license from the Secretary of State

authorizing it to do business in the State of Alabama as a common carrier railroad for all years prior to and during the year 1908.

The plaintiff further states that the assessed value above set out in this count of the property hereinabove described was embraced by the defendant in his total valuation of the tangible property of the plaintiff, amounting to $15,704,215.00, and forming the basis upon which the defendant fixed the so-called franchise tax, aggregating for state and county purposes $23,659.82 against the plaintiff under the Act of March 7, 1907, herein complained of, as shown by Exhibit D made a part of the second count of the original complaint and now referred to and made part of this count.

Plaintiff herewith refers to and makes part of this count the statement designated as Exhibit E and attached to the original complaint, the item of local property owned and belonging to each of the railroads or divisions in Alabama owned and operated by the plaintiff, and the counties in which such roads are located, and the assessed value in each county for the year 1907.

Plaintiff further avers that under and by virtue of its purchase or lease of the property of the domestic railroad corporation in this count aforementioned, it made and entered into a lawful contract with said Company, whose property, rights and franchises it purchased or leased, whereby it obtained the right to do an intrastate and an interstate business as a common carrier of freight and passengers in the State of Alabama by and over said railroad so purchased or leased, and that by such purchase or lease a further contract was made and entered into for a good and valuable consideration by and between the State of Alabama and the plaintiff, whereby all of said property and franchises were never to be taken or treated in any respect as if owned or operated by foreign corporations,
84 or otherwise taxed or treated in any respect than if the same were owned or operated by domestic corporation of Alabama.

Plaintiff avers and insists that the obligations of said several contracts, or either of them, cannot be lawfully impaired by imposing upon the plaintiff or its said properties and franchises in Alabama, acquired as aforesaid, any burden by taxation or otherwise, other than such as are imposed upon corporations incorporated and organized under the laws of Alabama engaged under substantially the same conditions in the same kind of business, and that the said Act of March 7, 1907, herein complained of, under which said so-called franchise was demanded and received from it by defendant unjustly discriminated against the plaintiff in the use of the property so purchased by it by imposing upon the capital employed in the operation of said property a burden of taxation not imposed by law upon individuals or domestic corporations engaged in the same business under substantially the same conditions, and thereby impairs the obligation both of the contract entered into by and between the plaintiff and the said railroad corporation whose property, rights and franchises it purchased or leased and the obligation of said contract between the State of Alabama and the plaintiff arising out of such purchase or lease, and that the said law is, therefore, in conflict with so much of the tenth section of Article 1 of the Constitution of

the United States as prohibits the State of Alabama from passing any law impairing the obligations of a contract, and is, in so far as it is applicable to the property aforesaid, void, and the plaintiff here claims the protection of said provision of section 10, Article 1, of the Constitution of the United States, and claims thereunder the right to recover the money sued for under this count.

The plaintiff further states that the said domestic corporation whose property rights and other franchises were sold and conveyed to plaintiff did not convey the franchise to be a corporation, but retained the same, and that said corporation still exists as such.

85 The plaintiff states that the enforcement of so much of the tax imposed by said Act of March 7, 1907, as is herein complained of, would impair the obligation of the contract aforesaid between the State of Alabama and the plaintiff, and the enforcement of the penalties and franchises therein prescribed against the plaintiff would prohibit it from carrying on the business of a common carrier by railroad of intrastate freight and passengers, and from maintaining or demanding any action in any of the courts of this State upon a contract made in this State, other than contracts based upon interstate commerce and would deprive plaintiff of its property and the use thereof for intrastate commerce, as well as the greater part of its value, without due process of law, and would amount to a denial to it of the equal protection of the law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.

In and by the charter of the said Railroad Company the property and franchises of which plaintiff purchased or leased, as hereinbefore in this count alleged, the right was conferred and the duty imposed upon said Company to receive and transport, for hire or compensation, over its railroad, as a public highway, and by said company as a common carrier, passengers and freight, tendered to it for transportation, from points within the State of Alabama to other points within said State, and between points in the State of Alabama and points in other States, and to receive and transport freight and passengers and cars, loaded or empty, of other railroads doing business in Alabama which were being transported from one point in the State of Alabama to another point in said State, and also freight and passengers, and cars, loaded or empty, of other railroads, being transported between points in the State of Alabama and points in other States; and in and by the purchase or lease of said railroad property and franchise hereinabove alleged, the plaintiff acquired said right to so receive and transport such freight, passengers and cars, and it became its duty to so receive and transport the same, and plaintiff has, under the contracts created by or arising out of such purchase or lease, ever since owned and possessed, and

86 still owns and possesses the right and franchise to so receive and transport such freight, passengers and cars, and has ever since been and still is subject to the duty and obligation to receive and transport the same; and plaintiff by the purchase or lease of said railroad property and franchises became and has ever since remained obligated to operate said railroad as a common carrier of

such passengers, freights and cars, and is still so obligated and bound to operate the same.

In and by Section 242 of the Constitution of Alabama it is provided as follows:

"242. All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this State, and connect at the State line, with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers and cars, loaded or empty, of the others, without delay or discrimination."

Said provisions were also contained in the Constitution of Alabama of 1875. Said provisions of the Constitution of Alabama were made operative by section 3459 of the Code of Alabama of 1896, which reads as follows:

"3459. Railroads public highways.—The main track of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad."

And said constitutional provisions are still made operative by section 5520 of the Code of Alabama of 1907, which reads as follows:

"5520. Railroads and common carriers defined.—All railroads are
87 public highways, and all corporations, companies, firms or individuals engaged in the transportation of persons or freight over railroads for hire, are common carriers."

By section 5549 of the Code of Alabama of 1907 it is further provided as follows:

"5549. Reception and transportation of freight and cars required and provided for.—Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever tendered at a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law or the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and shall forward the same without delay and within a reasonable time to the point of destination, under and in compliance with such reasonable rules, regulations and requirements as may be prescribed by the railroad commission or by law, and upon the failure of any such railroad company or other common carrier doing business in this state to so receive and so transport goods, merchandise, or property of any description, delivered to it for shipment to and from any points within the state in such reasonable time as the railroad commission or the law may prescribe unless otherwise agreed upon between the company and the shipper, or unless such property be burned, stolen, or otherwise destroyed, such railroad company or other common carrier shall forfeit to the party aggrieved such sum as may now or

hereafter be prescribed by law for such delay, and, in addition, shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport."

Plaintiff avers that under section 242 of the Constitution of Alabama, and under said several provisions of said Code of Alabama, it cannot, if by the operation of its railroads in Alabama it engages in the transportation of freight and passengers between points
88 in the State of Alabama, and point- in other States, decline to receive and transport as part of its common carrier business freight and passengers from points in the State of Alabama to other point- in the State of Alabama, but is obliged by said constitutional and statutory provisions to receive and transport freight and passengers between points in Alabama as part of its general business as a common carrier. That it is engaged in, and, under said laws, it is obliged to engage in one inseparable business, consisting of the transportation of interstate and intrastate freight and passengers; that both said intrastate and interstate freight and passengers are transported, and are required by law to be transported, under indivisible franchises and rights and with the same property, and that the tax required by the act of the Legislature of the State of Alabama, approved March 7, 1907, and entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," and the collection of which for the year 1908 is here complained of, is a tax upon such indivisible business, and constitutes and is a regulation of and a direct burden upon the interstate commerce that plaintiff is engaged in, and constitutes an interference with the powers of Congress to regulate commerce among the several states, and said act, because thereof, interferes with the powers of Congress conferred by Section 8 of Article I of the Constitution of the United States and is void, and plaintiff here claims protection under said section 8 of Article I of the Constitution of the United States against the burdens imposed by said act upon the commerce among the several States in which it is engaged, as aforesaid.

The plaintiff avers that the defendant is the Judge of the Probate Court of Montgomery County, Alabama, and that on the 29th day of February, 1908, and for many years prior thereto, the plaintiff had a resident agent in the City of Montgomery, in said County, and the defendant, as Judge aforesaid, demanded of the plaintiff payment of the whole of the so-called franchise tax, and declined to
89 receive part of such tax without the payment of all of it, provided by said Act of March 7, 1907, hereinbefore referred to.

And the plaintiff avers that it owned and operated in said business in said State many millions of dollars of railroad, and a large amount of equipment, and if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the cost of operating the same, and the value of said property would thereby be ruined and rendered almost valueless. And plaintiff avers that under duress, because of the provisions of the said law prohibiting

the plaintiff from doing any business in the State of Alabama not constituting interstate commerce, or to maintain and demand any action in any of the courts of this State upon a contract made in this State, other than contracts based on interstate commerce, unless it shall have paid said tax within sixty days after the same became due, and because of other penalties with which it was threatened for a failure to pay said tax, it caused its Vice President and Secretary to make a written statement, under their oaths, to the defendant as the Judge of the Probate Court of Montgomery County, showing the name of the plaintiff, the state and county under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock, the actual amount of capital employed in this State, and delivered said statement, under protest, to the defendant as Judge of the Probate Court of Montgomery County. A copy of said statement is made a part of the original complaint in this cause, marked "Exhibit A" and is here referred to and made a part of this count. By said statement the actual amount of capital employed by the plaintiff in the State of Alabama is given at the sum of $1,295,950.77. Upon the presentation of this statement to him, the defendant, as the Judge of the Probate Court of Montgomery County, caused one of the officers of the plaintiff to come before him, and to be sworn and examined by him with reference to said matter, and after the examination of said officer the defendant, as

90 such Judge of Probate, declared that the assessed value of all of the tangible property of the plaintiff (including the assessed value of the railroad property purchased by the plaintiff as in this count above stated) employed in the State of Alabama, aggregating the sum of $15,701,215.00, was the actual amount of its capital stock employed in this State within the meaning of the Act of the Legislature of Alabama approved March 7, 1907, known as House Bill No. 611, and entitled "An Act to provide for the revenue of this State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," and further found that the amount of the franchise tax calculated upon said basis and due to the State of Alabama was $15,773.22, and the amount of said tax payable to the county of $7,886.60 aggregated the sum of $23,659.82, which said sum the defendant as such Judge of Probate demanded of the plaintiff as an annual franchise tax due under the provisions of said act for the current year. And the plaintiff under duress, because of the provisions of said Act of the Legislature of the State of Alabama providing that no foreign corporation shall do business in the State of Alabama, not constituting interstate commerce, and maintain or demand any action in the courts of the State of Alabama upon a contract made in said State, other than contracts based on interstate commerce, unless such corporation shall have paid said tax within sixty days after the same became due, and because of other penalties with which it is threatened for a failure to pay said tax, paid said tax under duress to the defendant, which said protest is made part of the original complaint in this cause, and is marked on the margin "Exhibit B" and is here referred to and made part of this count.

Plaintiff avers that immediately upon the payment of said tax it notified the defendant not to pay said taxes over to the State of Alabama, or any other person, and that suit would be, within a reasonable time, brought against him for the recovery of the same—a copy of which said notice is made part of the original complaint in
91 this cause and marked in the margin "Exhibit C" and is here referred to and made part of this count. And the plaintiff avers that defendant still has possession of the money so paid to him.

GREGORY L. SMITH,
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Attorneys for Plaintiff.

Filed Aug. 31, 1908.

H. N. HUGHES, *Clerk.*

Allowed and filed this 9th day of October, 1908.

H. N. HUGHES, *Clerk.*

Amendment No. 2

LOUISVILLE & NASHVILLE RAILROAD COMPANY
versus
JOHN B. GASTON.

Plaintiff, by leave of the court, further amends its complaint by adding the following counts thereto

Count M.

M. Plaintiff claims of the defendant the further sum of $23,659.82 for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, the Louisville & Nashville Railroad Company, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. Said money was so received by the defendant as the Judge of Probate of Montgomery County, Alabama, from the plaintiff, the Louisville & Nashville Railroad Company, as a franchise tax which the defendant demanded of the plaintiff and alleged to be due by it under an Act of the Legislature, approved March 7, 1907, known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax,"
92 which said Act of the Legislature the plaintiff avers is, as to the plaintiff, unconstitutional and void, for the following reasons:

1st. Because said tax in connection with the tax imposed by law under an act of the legislature of Alabama, approved March 1, 1907, and numbered 218 in the published Act of Alabama for 1907, upon the franchise or intangible property and assets of persons, associations and corporations engaged as common carriers in this state in the busi-

ness of transporting persons or property over any railroad constitutes a double taxation upon the property of foreign railroads and their right to exercise their franchises not imposed upon domestic corporations engaged in a like business under the same circumstances, and thereby denies to foreign corporations within the jurisdiction of the state the equal protection of the law in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

2nd. Because Section 232 of the Constitution of Alabama, in-so-far as it authorizes the imposition of the said tax provided for in said act, known as house bill number 611 and entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this state under the laws of the State of Alabama to pay an annual franchise tax," imposes a burden upon foreign corporations within the jurisdiction of the State of Alabama not imposed upon domestic corporations doing a like business in said state under like circumstances, and thereby denies to said foreign corporations the equal protection of the law in violation of Section 1 of the 14th Amendment of the Constitution of the United States.

And the plaintiff here claims the protection of the said first section of the 14th Amendment of the Constitution of the United States against the burdens so imposed upon it by said act known as aforesaid as house bill 611.

And plaintiff avers that it is a person within the jurisdiction of the State of Alabama; within the meaning of the said fourteenth amendment of the Constitution of the United States, in that it had
93 during all of said period since July, 1872, and prior to February 29, 1908, done all that a foreign corporation was required by the Constitution and laws of Alabama to do in order to authorize it to do business in the State of Alabama, and to that end it had a known place of business, namely, Montgomery County in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument of writing under its corporate seal and signed officially by its President and Secretary, designating a known place of business in the State of Alabama and an authorized agent residing thereat. It also paid in each year at the time prescribed by the laws of Alabama its annual license tax to be paid by foreign corporations doing business in Alabama, and had received a license from the Secretary of State authorizing it to do business in the State of Alabama as a common carrier railroad for all years prior to and during the year 1908.

And in that it is a perpetual corporation, created and organized under the laws of Kentucky in the year 1850, and that by the Act of the Legislature of Kentucky, approved the 6th day of March, 1878, its charter was so amended as to authorize its President and Directors, with the assent and approval of a majority in interest of the stockholders of the Company present or represented at an annual or called meeting thereof, to operate, lease or purchase, upon such terms or in such manner as they deemed best, any railroad in any other state or states deemed necessary for the protection of the interests of the stockholders.

The provisions of the first section of said act read as follows:

"SECTION 1. That the charter of the Louisville & Nashville Railroad Company be and is hereby so amended as to authorize its president and directors, with the assent or approval of a majority in interest of the stockholders of the company present or represented at any annual or called meeting thereof, to operate, lease or purchase upon such terms or in such manner as they deem best, any
94 railroad in any other state, or states, deemed necessary for the protection of the interests of the stockholders."

By an Act of the Legislature of Kentucky, approved the 27th day of January, 1880, the charter of the plaintiff was further amended so as to authorize said company to purchase and hold a majority in amount of capital stock in any railroad company, or companies, chartered by any other state, or states, in order to secure to the Louisville & Nashville Railroad Company the control in the management and operation of said railroad companies in such other state, or states. The first section of said act, wherein said powers are conferred, reads as follows:

"SECTION 1. That in addition to the power and authority conferred upon the Louisville & Nashville Railroad Company by the act approved March 6, 1878, chapter 278, entitled 'An act to amend the charter of the Louisville & Nashville Railroad Company,' 'to operate, lease or purchase upon such terms, or in such manner as the president and directors might deem best, any railroad in any other state, or states, deemed necessary for the protection of the interests of the stockholders,' the said company shall also have the power and authority to purchase and hold a majority in amount of the capital stock of any railroad company or companies, chartered by any other State in order to secure to the Louisville & Nashville Railroad Company the control in the management and operation as aforesaid and in such other State or States; provided, that a majority in interest of the stockholders of the company present or represented by proxies at any annual or called meeting thereof shall accept this act as an amendment to its charter."

And the plaintiff avers that said amendments to its charter were duly accepted by a majority in interest of the stockholders of the plaintiff present and lawfully represented by proxies at a meeting, or meetings, of the stockholders of the plaintiff duly held for that purpose, and that the plaintiff has ever since exercised the said powers by and with the consent of its stockholders.

95 The plaintiff states that the Legislature of Alabama passed an Act, which was approved February 18, 1891, and was afterward incorporated as Section 1169 in the Code of Alabama of 1896, as follows:

"Domestic may sell its property and franchises to foreign corporations.—Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another state, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock all of its property, road-bed, rights and franchises, but the purchasing corporation shall keep an office and an agent in this

State; and such railroad so purchased shall be, in all respects, subject to the laws of this State as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired."

By an Act of the General Assembly of Alabama approved February 7, 1899, said act was amended so as to read as follows:

"An Act to Amend Section 1169 of the Code."

"SECTION 1. Be it enacted by the General Assembly of Alabama, that Section 1169 of the Code shall be, and the same is hereby amended so as to read as follows: 1169, 'Domestic may sell its property and franchise to foreign corporation. Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, road bed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another state, owning, or operating by lease or otherwise, any railroad in this state, to purchase at judicial sale or otherwise, or to lease and to hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock or of the property, road beds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of
the purchasing or leasing corporation or its predecessor in
96 interest shall be connected, either directly or by means of an
intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad, so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized."

The plaintiff states that the Legislature of Alabama passed an Act, which was approved February 11, 1891, and was afterward incorporated as Section 1170 in said Code, and has ever since its enactment remained in full force and effect, as follows:

"Aid to, or purchase and lease of other roads.—A corporation, chartered under the laws of this or any other state heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation organized in pursuance of the laws of this or any other state, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with, and calculated to promote the objects for which they were created;

but no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

7 Plaintiff avers that it is a foreign corporation within the meaning of said Act, having been duly incorporated and organized under an Act of the General Assembly of the State of Kentucky, approved March 5, 1850, by which, and the amendments thereto enacted by said General Assembly March 6, 1878, and January 27, 1880, it was authorized and empowered to perpetually own, purchase, construct, lease, operate, control and maintain railroads in the State of Kentucky, Alabama, and other States, and is and has been since July 1, 1872, under and by virtue of the laws of the State of Alabama, engaged in the business of a common carrier railroad corporation in this State, and is and has since said date been doing both interstate and intrastate business therein.

Plaintiff acquired the several railroad properties with which it has heretofore carried on the business of a common carrier railroad in Alabama and with which it still does said business as follows, viz.:

1. The Alabama & Florida Railroad Company was duly incorporated and organized August 23, 1898, under the laws of Alabama; that plaintiff at the time of the organization of said company was and still is the owner of its entire capital stock; and on December 7, 1900, said company sold and conveyed to plaintiff by deed of record all its property and franchises, including 32.76 miles of main line railroad in Alabama then in operation and 14.91 miles of main line railroad then in course of construction in Alabama, and which has since been finished and put into operation. The assessed value of the road-bed, tracks and equipment of said Alabama & Florida Railroad in 1907 was $1,056,140, and the assessed value of the local property thereon and belonging thereto for the same year was $21,510.

2. The plaintiff avers that the Alabama Mineral Railroad Company was duly incorporated and organized July 28, 1890, under the laws of Alabama; that plaintiff, at the time of the organization of said company was and still is the owner of its entire capital stock; and on September 29, 1903, said company sold and conveyed 98 to plaintiff by deed of record all its property and franchises, including 132.30 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of the said Alabama Mineral Railroad in 1907 was $1,830,080.00, and the assessed value of the local property thereon and belonging thereto for the same year was $53,390.00.

3. The plaintiff avers that the Birmingham Mineral Railroad Company was duly incorporated and organized March 19, 1884, under the laws of Alabama; that plaintiff at the time of the organization of said company was and still is the owner of its entire capital

stock; and on January 11, 1904, said company sold and conveyed to plaintiff by deed of record all its property and franchises, including 169.80 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of the said Birmingham Mineral Railroad in 1907 was $3,623,345.00 and the assessed value of the local property thereon and belonging thereto for the same year was $16,495.00. Included in these assessments as a part of the Birmingham Mineral Railroad were the properties of the Oneonta & Attalla Railroad Company, which was duly incorporated and organized June 23, 1900, under the laws of Alabama; that plaintiff at the time of the organization of said company was and still is the owner of its entire capital stock; and on December 15, 1900, said company sold and conveyed to plaintiff by deed of record 11.3 miles of its main line railroad, and on September 23, 1905, sold and conveyed to plaintiff by deed of record 15.6 miles of its main line railroad.

Included also in the last mentioned assessments, as a part of the Birmingham Mineral Railroad, were the properties of the North Alabama Railroad Company, which was duly incorporated and organized March 17, 1900, under the laws of Alabama; that plaintiff, at the time of the organization of said company was and still is the owner of its entire capital stock; and on December 15, 1900, said company sold and conveyed to plaintiff by deed of record its Brookwood Branch, being 3.4 miles of main line railroad, and on May 1, 1905, said company sold and conveyed to plaintiff by deed of
99 record the remainder of its properties and franchises, including 32.205 miles of main line railroad.

4. The plaintiff avers that the Birmingham, Selma & New Orleans Railroad Company was duly incorporated and organized November 16, 1886, under the laws of Alabama; that plaintiff on September 10, 1900, became the owner of its entire capital stock, and has ever since been the owner thereof; and on April 21, 1902, said company sold and conveyed to plaintiff all its properties and franchises, including 60.3 miles of main line railroad in Alabama, known as the Myrtlewood Branch. The assessed value of the road-bed, tracks and equipment of the said Myrtlewood Branch in 1907 was $504,915.00, and the assessed value of the local property thereon and belonging thereto for the same year was $15,850.00.

5. The plaintiff avers that the Montgomery & Prattville Railroad Company was duly incorporated and organized March 29, 1895, under the laws of Alabama; that plaintiff at the time said company was organized owned and still owns its entire capital stock; and on March 9, 1896, and on June 3, 1896, said company sold and conveyed to plaintiff by deeds of record all its properties and franchises, including 10.35 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of the said Montgomery & Prattville Railroad in 1907 was $39,695.00, and the assessed value of the local property thereon and belonging thereto for the same year was $2,080.00.

6. The plaintiff further avers that the Mobile & Montgomery Railway Company was a corporation under the laws of Alabama,

and was created and organized as follows: By an Act of the Legislature of Alabama, approved February 11, 1850, the Alabama & Florida Railroad Company was incorporated and the charter thereof was subsequently amended by several acts of the Legislature of the State of Alabama, approved respectively February 16, 1854, and February 20, 1854.

By an Act of the Legislature of Alabama, approved February 15, 1857, the Mobile & Great Northern Railroad Company was
100 incorporated and the same thereafter amended by an act of the Legislature of the State of Alabama, approved February 8, 1858. The said two corporations were consolidated into one company under the name and style of the Mobile & Montgomery Railroad Company under powers conferred upon them by an act of the legislature of Alabama, approved August 5, 1868, amended by an act of the Legislature of Alabama, approved December 28, 1868, and by and under the terms of said act of consolidation the said Mobile & Montgomery Railroad Company owned and possessed all of the property rights and franchises conferred upon the Alabama & Florida Railroad Company and the Mobile & Great Northern Railroad Company under and by virtue of their said several charters.

Plaintiff further avers that under the charter of the said Alabama & Florida Railroad Company and of the said Mobile & Great Northern Railroad Company, said companies had the power and the perpetual franchise to construct and operate a railroad between the City of Montgomery and the City of Mobile, and did so construct and operate said railroad, and the railroad so constructed and operated by them was, by said act of consolidation, obtained by and became the property of the Mobile & Montgomery Railroad Company, which said company thereafter operated said railroad under said perpetual franchise. The said Mobile & Montgomery Railroad Company had the authority and power under its said charter to mortgage all of its property rights and franchises, and under and pursuant to said authority it did mortgage all of its property rights and franchises by a deed of trust executed to Philo C. Calhoun, Timothy Porter and Josiah Morris on the 25th day of February, 1870, to secure certain bonds issued by it. Default was made in the payment of the said debt secured by said deed of trust, and said deed of trust or mortgage was foreclosed, and the property and franchises covered thereby sold on November 14, 1874, under decree of the chancery court for the second district, southern chancery division of Alabama, and purchased for the holders of the bonds secured by said deed of trust by the trustee named therein, and
101 thereafter said purchasers organized themselves into a corporation under the name of the Mobile & Montgomery Railway Company under and pursuant to the general laws of Alabama for such cases made and provided. The conveyance of said property and franchises of the said Mobile & Montgomery Railroad Company was executed under the orders of said court to the Mobile & Montgomery Railway Company, and said company thereafter owned and exercised said franchises and operated said railroad property

until the 17th day of December, 1900. On and prior to said date, the plaintiff obtained and became the owner of all of the capital stock of the said Mobile & Montgomery Railway Company, and with the approval of a majority in interest of its stockholders present and represented at a called meeting thereof, the plaintiff purchased all of the property and franchises of the said Mobile & Montgomery Railway Company, including 178.57 miles of main line railroad in Alabama, and at the last mentioned date obtained a conveyance to it of said property and franchises executed in due form of law by the said Mobile & Montgomery Railway Company, which is of record, and the plaintiff has ever since said date owned said property and franchises and exercised the same by operating said property as a common carrier of interstate and intrastate commerce in the State of Alabama.

The assessed value of the road-bed, tracks and equipment of said Mobile & Montgomery Railway in 1907 was $4,064,580.00, and the assessed value of the local property thereon and belonging thereto for the same year was $225,539.00.

7. The plaintiff avers *that* the New Orleans, Mobile & Texas Railroad Company, as re-organized, was duly incorporated and organized April 29, 1880, under the laws of Alabama; that at the time said Company was thus organized the plaintiff was and ever since has been the owner of said company's entire capital stock; and on October 5, 1881, said company sold and conveyed to plaintiff by deed of record all its properties and franchises, including 29.24 miles of main line railroad in Alabama. The assessed value of the
102 road-bed, tracks and equipment of said New Orleans, Mobile & Texas Railroad, in Alabama, in 1907, was $730,380.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $303,123.00.

8. The plaintiff avers that the Nashville, Florence & Sheffield Railway Company was duly incorporated and organized May 13, 1887, under the laws of Alabama; that the entire amount of the capital stock of said company issued was $862,050.00, of which stock the plaintiff had at various dates prior to April 10, 1900, acquired and become the owner of $804,950.00. All the properties and franchises of said company were sold at decretal sale April 10, 1900, and were purchased by the plaintiff, and on May 31, 1900, said company's properties and franchises, including 17.19 miles of main line railroad in Alabama so purchased by plaintiff were conveyed by a Special Master of the court, having jurisdiction of the subject matter and the parties, and decreeing the sale aforesaid; and on the same date the said company sold and conveyed by deed of record its equity of redemption in said properties and franchises to the plaintiff therein. The said sales and conveyances rendered all the capital stock in said Nashville, Florence & Sheffield Railroad Company worthless. The assessed value of the road-bed, tracks and equipment of said last named railroad in Alabama in 1907 was $200,870.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $18,900.00.

For a long time prior to, and at the time of, the said sale and

conveyance of said railroad to the plaintiff, the plaintiff owned and operated a railroad from Nashville, in the State of Tennessee, to Decatur, in the State of Alabama, which railroad connected at Columbia, Tennessee, with the said railroad so purchased and conveyed to it by the Nashville, Florence & Sheffield Railway Company.

8½g. The plaintiff avers that the Sheffield & Tuscumbia Railway, which extends from a point in Sheffield to a point in Tuscumbia, was organized under the name of the Sheffield & Tuscumbia
103 Street Railway Company as a street railroad under the general incorporation laws of the State of Alabama on November 26, 1886. By an Act of the General Assembly of Alabama, approved February 26, 1887, said Company was empowered to extend its railroad from Sheffield to Tuscumbia, and by an Act of the General Assembly of Alabama, approved February 18, 1895, the name of said company was changed to the Sheffield & Tuscumbia Railway Company, and the power to operate as a common carrier steam railroad was conferred upon it. By a deed dated March 9, 1896, the said Sheffield & Tuscumbia Railway Company conveyed all of its property rights and franchises, except the right to exist as a corporation, to the plaintiff the Louisville & Nashville Railroad Company, and plaintiff avers that at and before the time of said conveyance to it, the Louisville & Nashville Railroad Company, the line of the railroad of the Sheffield & Tuscumbia Railway Company was connected with the line of the railroad owned by the plaintiff extending from Columbia, Tennessee, to Sheffield, Alabama.

9. The plaintiff avers that the Pensacola Railroad Company was duly incorporated and organized February 27, 1877, under the law of Florida; that on February 27, 1880, the plaintiff had become the owner of the entire capital stock of said company; and on October 22, 1880, said company sold and conveyed all its properties and franchises to the plaintiff by deed of record, including .1 miles of main line railroad in Alabama. The assessed value of the road-bed, tracks and equipment of said Pensacola Railroad in Alabama in 1907 was $1,920.00, and the assessed value of the local property thereon and belonging thereto in Alabama for the same year was $400.00.

10. The plaintiff avers that the Southern Alabama Railroad Company was duly incorporated and organized January 21, 1899, under the laws of Alabama; that at the time said company was organized the plaintiff was and has been ever since the owner of its entire capital stock; and on December 11, 1899, the said company sold and conveyed to plaintiff by deed of record all its property and
104 franchises including 109.29 miles of main line railroad in Alabama.

The plaintiff further avers that the Montgomery, Hayneville and Camden Railroad Company was duly incorporated and organized December 11, 1899. Subsequently and prior to June 7, 1900, the plaintiff became the owner of the entire amount of said company's capital stock, and on the last mentioned date said company sold and conveyed to plaintiff by deed of record all its properties and franchises, including a right of way and partially constructed road-bed a distance of about 7.5 miles in Alabama, which partially constructed

road-bed thus acquired was completed and put in operation February 15, 1901, thus forming what is now the Camden Branch of said Southern Alabama Railroad. The assessed value of the road-bed, tracks and equipment of said Southern Alabama Railroad (including said Camden Branch) in 1907 was $1,169,670.00, and the assessed value of the local property thereon and belonging thereto for the same year was $27,970.00.

11. The plaintiff further avers that the Tennessee & Alabama Central Railroad Company was a railroad company chartered by an act of the Legislature of the State of Alabama, approved December 19, 1853, with a perpetual franchise and power and authority in and by its charter to construct, maintain and operate a railroad from Montevallo, in Shelby County, in a northeastern direction, through Decatur, in Morgan County, and across the Tennessee River at a point, thence through Athens, in Limestone County, and from thence to some point on the boundary line between the State of Alabama and State of Tennessee, thence to connect with a railroad leading from Pulaski to Columbia, Tennessee; in and by said charter the said Railroad Company had further power for the purpose of uniting with other roads, as well as to extend its road, to build and construct branch railroads not more than five miles in length on either side of said main road in any of the counties near the main road, and also had power and authority to form junctions with other railroads.

Such railroad company had, under its charter, the further
105 power and authority to unite and consolidate into one road all or any parts of said railroad with any other railroad that might connect with its railroad at the Tennessee line.

The said Tennessee & Alabama Central Railroad Company, under and pursuant to its said charter power and franchise constructed a railroad from what is now known as the Memphis & Charleston Junction, on or near the Tennessee River, northwardly to the Tennessee line near Veto, Alabama, and was thereafter, in the year 1886, consolidated with other railroads created by and organized under the laws of Tennessee, whose railroad connected with the railroad of the Tennessee & Alabama Railroad Company at the Tennessee line. The said consolidation made and the railroad corporation formed thereby is known as the Nashville & Decatur Railroad Company, and this railroad extended from Nashville, in the State of Tennessee, to the Memphis & Charleston Junction on the Tennessee River in the State of Alabama.

On and prior to the 18th day of October, 1899, the railroad of the plaintiff extended from the City of Louisville, in the State of Kentucky, to the City of Nashville, in the State of Tennessee, and was there connected or continuous with the line of said Nashville & Decatur Railroad Company, and on the said 18th day of October, 1899, the plaintiff, the Louisville & Nashville Railroad Company, with the assent or approval of a majority in interest of its stockholders present or represented at a called meeting thereof, leased by written lease duly executed and of record the property and franchises of the said Nashville & Decatur Railroad Company, including 26.42 miles of main line railroad in Alabama, for a term of 999 years to

commence on the first day of July, 1900, and the plaintiff has ever since been in possession of said railroad, its property and franchises, under said lease, and has been operating the same as a common carrier of interstate and intrastate commerce in the State of Alabama, as well as in the State of Tennessee.

The assessed value of the road-bed, tracks and equipment of said Nashville & Decatur Railroad in Alabama in 1907 was
106 $720,200.00, and the assessed value of the local property thereon and belonging thereto in Alabama, including the shops, machinery, etc., on main stem at New Decatur, for the same year, was $248,650.00.

In and by the several charters of the railroad companies, the properties and franchises of which plaintiff purchased or leased, as hereinbefore in this count alleged, the right was conferred and the duty imposed upon each of said companies to receive and transport, for hire or compensation, over its railroad, as a public highway, and by said company as a common carrier, passenger and freight, tendered to them for transportation, from points within the State of Alabama to other points within said State, and between points in the State of Alabama and points in other States, and to receive and transport freight and passengers and cars, loaded or empty, of other railroads doing business in Alabama which were being transported from one point in the State of Alabama to another point in said State, and also freight and passengers and cars loaded or empty, of other railroads, being transported between points in the State of Alabama and points in other States; and in and by the purchase or lease of said railroad properties and franchise hereinabove alleged, the plaintiff acquired said right to so receive and transport such freight, passengers and cars, and it became its duty to so receive and transport the same, and plaintiff has, under the contracts created by or arising out of such purchases and leases, ever since owned and possessed, and still owns and possesses the right and franchise to so receive and transport such freight, passengers and cars and has ever since been and still is subject to the duty and obligation to receive and transport the same; and plaintiff by the purchases or leases of said railroad properties and franchises became and has ever since remained obligated to operate said railroads as common carriers of such passengers, freights and cars, and is still so obligated and bound to operate the same.

In and by Section 242 of the Constitution of Alabama it is pro-
vided as follows:

107 "242. All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this State, and connect at the State line, with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers and cars, loaded or empty, of the others, without delay or discrimination."

Said provisions were also contained in the Constitution of Alabama

of 1875. Said provisions of the Constitution of Alabama were made operative by section 3459 of the Code of Alabama of 1896, which reads as follows:

"3459. Railroads public highways.—The main track of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad."

And said constitutional provisions are still made operative by Section 520 of the Code of Alabama of 1907, which reads as follows:

"Railroads and common carriers defined.—All railroads are public highways, and all corporations, companies, firms or individuals engaged in the transportaion of persons or freight over railroads for hire, are common carriers."

By Section 5549 of the Code of Alabama of 1907, it is further provided as follows:

"5549. Reception and transportation of freight and cars required and provided for. Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever tendered
108 at a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law of the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a sliding, and shall forward the same without delay and within a reasonable time to the point of destination, under and in compliance with such reasonable rules, regulations and requirements as may be prescribed by the railroad commission or by law, and upon the failure of any such railroad company or other common carrier doing business in this state to so receive and so transport goods, merchandise or property of any description, delivered to it for shipment to and from any points within the state in such reasonable time as the railroad commission or the law may prescribe unless otherwise agreed upon between the company and the shipper, or unless such property be burned, stolen, or otherwise destroyed, such railroad company or other common carrier shall forfeit to the party aggrieved such sum as may now or hereafter be prescribed by law for such delay, and, in addition, shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport."

The plaintiff avers that under section 242 of the Constitution of Alabama, and under said several provisions of said Code of Alabama, it cannot, if by the operation of its railroads in Alabama it engage in the transportation of freight and passengers between points in the State of Alabama, and points in other States, decline to receive and transport as part of its common carrier business freight and passengers from points in the State of Alabama to other points in the State of Alabama, but is obliged by said constitutional and statutory provisions to receive and transport freight and passengers between points in Alabama as part of its general business as a common carrier.

And plaintiff further avers that the State of Alabama has exercised its jurisdiction over the plaintiff continuously ever since the plaintiff began to do business and to operate its railroads as a common carrier of freight and passengers in this State in 1872 in respect to all its properties and franchises situate within this
109 State; that the State of Alabama has subjected plaintiff to the same laws to which resident persons and domestic corporations carrying on like or similar business have been subjected, until the enactment of the statute herein complained of; that under the laws of the State of Alabama, there has been created the Railroad Commission of this State, with large and extensive powers and authority over the plaintiff, and all other persons and corporations owning and operating railroads in Alabama, and said Commission has at divers times and continuously since it was created and organized, February 26, 1881, exercised its powers, authority and control over the plaintiff in sundry ways and to exactly the same extent and in the same manner as it exercised the same over other persons or corporations conducting the like or similar business, or owning and operating railroads as common carriers of freight and passengers in Alabama.

Plaintiff further avers that it qualified in good faith to do business in the State of Alabama prior to July 1, 1872, and has ever since that date owned and operated, and now owns and operates in said business in said State many millions of dollars in value of railroad and a large equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless, and plaintiff avers that under duress and because of the excessive and onerous penalties provided in said Act, and especially because said statute provides that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due," plaintiff paid said sum under protest, and forthwith notified the defendant that it would sue him to recover the same, copies of which said protest and notice are attached to
110 the original complaint in this cause and designated as Exhibits "B" and "C," and are here referred to and made parts of this count, and plaintiff avers that defendant still holds said money.

The plaintiff states that continuously since it acquired ownership of its railroad properties in Alabama, beginning with the year 1872, there have been assessed against it annually, on account of such ownership, ad valorem taxes similar to those assessed against other persons and corporations owning like property, for the benefit of the state, counties, municipalities and taxing districts or jurisdictions in this State, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and of other persons

and corporations operating railroads in this State, under Section 1128 of the Code of Alabama of 1886, and Section 3489 of the Code of Alabama of 1896, since said sections were enacted and went into force and effect, respectively, up to and including the license tax based on gross earnings, imposed by the latter section, June 1, 1907, for the year ending May 31, 1908, to pay the annual expenses of the Railroad Commission of Alabama, as authorized by law.

Plaintiff has also paid on account of such ownership and operation of its railroads in Alabama all the taxes assessed against it under an Act of the Legislature of Alabama, approved March 4, 1907, known as House Bill 741, entitled "An Act to make subject to taxation and to tax the franchises or intangible property and assets of every person, association, company and corporation engaged as a common carrier in this State in the business of transporting persons or property over any railroads, etc., * * * or any other business which may be dependent upon the grant of public powers or privileges, or which may involve the operation of any public utility, and to provide for the valuation and manner of ascertaining the values of such franchises or intangible properties, and the distribution of the same for local taxation, and the levy, assessment and collection of said taxes thereon."

It has also paid the license fee and obtained the license provided for in an Act of the Legislature of Alabama, approved March
111 4, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations, or corporations organized under or by authority of the law of any other State or government than the State of Alabama, and to fix a punishment for a violation thereof."

All these exactions have been made by the State of Alabama upon corporations owning and operating a railroad in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized and existing under the laws of some other State, with the sole exception of the license fee last above mentioned, and which is a nominal amount (Ten Dollars per annum), and is exacted of foreign corporations only, for, as plaintiff is advised, mere police purposes, and in order that there may be a registration, kept in the office of the Secretary of State, of such foreign corporations doing business in Alabama.

To the contrary, however, the Act of the Legislature (approved March 7, 1907), of which plaintiff is now complaining herein, and under which the plaintiff was compelled to pay the said sums of $23,659.82 does not apply, and was not intended to apply, to any resident person or domestic corporation of the State of Alabama owning the same character of property and carrying on the same kind of business in this State as is owned and carried on in this State by corporations organized and existing under the laws of another State authorized to do and engaged in doing business in this State, and which are within the jurisdiction thereof, nor is there any like or similar exaction by the laws of Alabama of or

against domestic corporations or resident individuals of this State owning such or like property and engaged in such or like business.

Count N.

N. Plaintiff claims of the defendant the further sum of $23,659.82 for money, on the 29th day of February, 1908, received by the defendant to the use of the plaintiff, the Louisville & Nashville
112 Railroad Company, which sum of money, with interest thereon, is still unpaid and is the property of the plaintiff. Said money was so received by the defendant as the Judge of Probate of Montgomery County, Alabama, from the plaintiff, the Louisville & Nashville Railroad Company, as a franchise tax which the defendant demanded of the plaintiff and alleged to be due by it under an Act of the Legislature, approved March 7, 1907, known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," which said Act of the Legislature the plaintiff avers is, as to the plaintiff, unconstitutional and void.

And plaintiff avers that under section 21, Article 14 of the Constitution of Alabama of 1875, and by Section 242 of the Constitution of Alabama of 1901, it is provided that:

"Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this state and connect at the state line with railroads of other states."

and plaintiff avers that it is a corporation organized for such purpose, in that it is a corporation organized under the laws of Kentucky for the purpose of constructing, maintaining and operating railroads with full power and authority to operate, lease and purchase any railroad in any other state, or states. That it is so authorized by an amendment of its charter by an Act of the Legislature of the State of Kentucky, approved the sixth day of March, 1878. The provisions of the first section of said act read as follows:

"SECTION 1. That the charter of the Louisville & Nashville Railroad Company be and is hereby so amended as to authorize its president and directors, with the assent or approval of a majority in interest of the stockholders of the company present or represented at any annual or called meeting thereof, to operate, lease or purchase upon such terms or in such manner as they deem best, any
113 railroad in any other state, or states, deemed necessary for the protection of the interests of the stockholders."

And plaintiff further avers that it was further so authorized by an Act of the Legislature of Kentucky, approved the 27th day of January, 1880, the first section of which said Act —

"SECTION 1. That in addition to the powers and authority conferred upon the Louisville & Nashville Railroad Company by the act approved March 6, 1878, chapter 278 entitled 'An Act to amend the

charter of the Louisville & Nashville Railroad Company,' 'to operate, lease or purchase upon such terms, or in such manner as the president and directors might deem best, any railroad in any other state, or states, deemed necessary for the protection of the interests of the stockholders,' the said company shall also have the power and authority to purchase and hold a majority in amount of the capital stock of any railroad company, or companies, chartered by any other State in order to secure to the Louisville & Nashville Railroad Company the control in the management and operation as aforesaid and in such other State or States: provided, that a majority in interest of the stockholders of the company present or represented by proxies at any annual or called meeting thereof shall accept this act as an amendment to its charter."

And plaintiff avers that it availed itself of the privileges and powers conferred by the said section of the Constitution of the State of Alabama, and acquired several railroad properties owned or operated by it in the manner alleged in the last preceding count of this complaint (marked M), which allegations are here referred to and reiterated and made part of this count.

And the plaintiff avers that under said provisions of the said several constitutions of the State of Alabama, the right to do an intrastate business in said state cannot be denied it, and that no unequal burdens can by law be placed upon it that are not likewise placed upon domestic corporations engaged in the same kind of business in which plaintiff is engaged.

114 And the plaintiff avers that in and by the provisions of said act of the legislature of Alabama under which the sum here sued for was demanded and received of it by the defendant, a burden is imposed on foreign corporations which is not imposed upon domestic corporations engaged in the same business.

Plaintiff further avers that it qualified in good faith to do business in the State of Alabama prior to July 1, 1872, and has ever since that date owned and operated, and now owns and operates in said business in said State many millions of dollars in value of railroad and a large equipment, and that if not permitted to do an intrastate business in Alabama, plaintiff could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless, and plaintiff avers that under duress and because of the excessive and onerous penalties provided in said Act, and especially because said statute provides that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due," plaintiff paid said sum under protest, and forthwith notified the defendant that it would sue him to recover the same, copies of which said protest and notice are attached to the original complaint in this cause and designated as Exhibits "B" and "C," and are here referred to and made

parts of this count, and plaintiff avers that defendant still holds said money.

GREGORY L. SMITH,
GEO. W. JONES,
H. L. STONE,
J. M. FOSTER,
Attorneys for Plaintiff.

Filed Aug. 31, 1908.

H. N. HUGHES, *Clerk.*

115 Allowed and filed this 9th day of October, 1908.

H. N. HUGHES, *Clerk.*

In the City Court of Montgomery, Alabama.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
JOHN B. GASTON, Defendant.

Demurrers to Complaint.

Comes the defendant in the above styled cause, and demurs to the complaint filed in said cause, and to each count thereof, and for grounds of demurrer assigns the following:

1. Because it appears from said complaint that said tax complained of was legally and constitutionally levied, assessed and collected.

2. Because it appears from said complaint that the act of the Legislature imposing the tax complained of is constitutional and valid.

3. Because it appears from said complaint that neither the act of the Legislature levying said tax, nor the assessment or collection of the same, is in violation of any provision of the Constitution of the State of Alabama or of the Constitution of the United States.

4. Because it appears from said complaint that the act of the Legislature complained of, is not in violation of any provision of the Constitution of the State of Alabama or of the Constitution of the United States.

And defendant demurs to the first count of said complaint and assigns the following grounds of demurrer:

1. Because it appears from said count that the tax complained of and collected for the County of Montgomery, was legally and constitutionally collected.

116 2. Because it appears from said count, that Section 2 of said act of the Legislature complained of is not in violation of Section 45 of the Constitution of the State of Alabama, or of any other provision of said Constitution.

And defendant demurs to the second count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count, that the tax complained of therein, was legally and constitutionally levied and collected.

2. Because it appears from said count that the imposition of said

tax was not an unjust discrimination or denial to plaintiff of the equal protection of the law and was not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States or of any other provision of said Constitution.

3. Because it appears from said count that the tax complained of, or the levy and assessment thereof, is not in violation of Sections 211, 214, 215 and 217 of the Constitution of Alabama, or of any other provision of said Constitution.

And defendant demurs to the third count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count that the tax complained of was legally and constitutionally levied, assessed and collected.

2. Because it appears from said count that said act complained of, under which said franchise tax was demanded and received, does not impair the obligation of any contract between the State of Alabama and plaintiff, and is not in violation of Section 10 of Article I of the Constitution of the United States or any other provision of said Constitution.

3. Because it appears from said count that said Act complained of, under which said franchise tax was demanded and received, in so far as the same levies or imposes said tax, does not impair the obligation of any contract between the State of Alabama and plaintiff, or
117 the contract in said count alleged to have been created by the purchase of the railroads alleged in said count to have been purchased, and does not unjustly discriminate against plaintiff, and is not in violation of Section 10 of Article I of the Constitution of the United States, or of any provision of said Constitution.

4. Because said Court shows that plaintiff is a corporation organized and created under the laws of the State of Kentucky, and is engaged and authorized to do business in the State of Alabama as a common carrier, and is doing an intra-state business, and does not allege or show that plaintiff is not operating any railroad in Alabama other than railroads purchased by it under authority of the laws of the State of Alabama, or that it is not engaged in any business in the State of Alabama other than the business of operating said railroads so purchased.

5. Because said count shows that plaintiff is a corporation organized and created under the laws of the State of Kentucky and engaged in and authorized to do business in the State of Alabama, as a common carrier, doing an intra-state business, and further shows that it is operating railroads in the State of Alabama, doing an intra-state business, other than railroads which it has purchased or acquired under authority of the laws of the State of Alabama.

6. Because said count shows that plaintiff is a corporation created and organized under the laws of the State of Kentucky, and engaged in and authorized to carry on business in the State of Alabama, as a common carrier, and is doing an intra-state business, on railroads alleged to have been purchased by it under authority of the laws of the State of Alabama, and fails to show that it purchased said railroads in Alabama, or any of them, with the assent or approval of a majority in interest of its stockholders present or represented at any

annual or called meeting thereof, as required by its charter, as shown in said complaint.

7. Because said count shows that plaintiff is a corporation created and organized under the laws of the State of Kentucky, and engaged in and authorized to do business in the State of Alabama, as a
118 common carrier, and is doing an intra-state business in Alabama, operating railroads in Alabama alleged to have been purchased or acquired from Alabama corporations, under authority of the laws of Alabama, and fails to show that prior to the purchase or acquisition of said railroads, a meeting of the stockholders of the plaintiff corporation and a meeting of the stockholders of the respective corporations or companies, owning the roads so purchased, had been called and held at a time and place and in a manner designated, and that the holders of a majority, in value, of the stock of each corporation or company represented at such meetings, in person or by proxy, and voting thereat, assented to said purchase or lease, as required by Section 1170 of the Code of Alabama of 1896.

8. Because said count fails to show that the railroads so purchased by it, as alleged in said count, were, at the time of the alleged purchase, continuous or connected with plaintiff's railroad.

9. Because said count fails to aver or show that at the time plaintiff purchased or acquired, the first of the railroads alleged in said count to have been purchased or acquired, it was owning or operating, by lease or otherwise, any railroad in the State of Alabama.

10. Because said count fails to aver or show that at the time plaintiff purchased or acquired each of the railroads alleged in said count to have been purchased or acquired, it was owning or operating, by lease or otherwise, any railroad in the State of Alabama.

11. Because said count fails to aver or show, except by the averment of a legal conclusion, that it was authorized to purchase or acquire the railroads in Alabama alleged in said count to have been purchased or acquired.

12. Because the averments of said count do not show any contract between plaintiff and the State of Alabama, which is impaired by the levy or imposition and collection of the tax complained of.

119 And defendant demurs to the fourth count of said complaint, and for grounds of demurrer assigns the following:

1. Because it appears from said count that the tax complained of therein, was legally and constitutionally levied, assessed and collected.

2. Because it appears from said count that the value of all the tangible property of plaintiff in the State of Alabama, employed in the transaction of its business in said State, is the actual amount of capital employed by plaintiff in the State.

3. Because said count fails to show that the value of all the tangible property of plaintiff in the State of Alabama employed by it in the transaction of its business in said State was less than $15,704,215.00.

4. Because said count shows that the value of all tangible property of the plaintiff in the State of Alabama, employed by it in the transaction of its business in said State, was at least $15,704,215.00.

And defendant demurs to the 5th, 6th, 7th, 8th and 9th counts

of said complaint, separately and severally, and for grounds of demurrer to said counts, and each of them, assigns the same grounds hereinabove assigned to the 4th count of said complaint.

ALEX M. GARBER,
Attorney General.
H. C. SELHEIMER,
S. D. WEAKLEY,
Attorneys for Defendant.

Filed in office April 27, 1908.

H. N. HUGHES, *Clerk.*

120 City Court of Montgomery.

LOUISVILLE & NASHVILLE R. R. CO.
v.
JOHN B. GASTON.

Demurrers to Complaint as Amended.

Now comes the defendant in the above styled cause and demurs to the complaint as amended by the separate papers heretofore filed and allowed Oct. 9th, 1908, and to each count thereof, and for grounds of demurrer thereto assigns the same grounds heretofore assigned to the original complaint and each count thereof.

And defendant demurs to the third count of said complaint as amended, and for the grounds of demurrer assigns.

First. The same grounds heretofore assigned to the third count of the original complaint.

Second. Because the facts alleged in said Count as amended show that the tax complained of, and the Act imposing the same, do not constitute a regulation of, or a direct burden upon the interstate commerce in which plaintiff is engaged, and do not constitute an interference with the powers of Congress to regulate commerce among the several States, and are not in violation of Section 8 of Article 1 of the Constitution of the United States.

Third. Because the facts alleged in said count show that said tax, and the Act imposing the same, are not in violation of Section 8 of Article 1 of the Constitution of the United States.

Fourth. Because said count fails to show that the said several railroads alleged to have been purchased from domestic corporations have been constructed by the corporations from which said roads are alleged to have been purchased.

Fifth. Because said Act approved February 7th, 1899, amending Section 1169 of the Code of 1896, which is set out in said count and relied on is unconstitutional and void.

121 And defendant demurs to counts A, B, C, D, E, F, G, I, J, K, L and M, added by amendment to said complaint, separately and severally, and for grounds of demurrer assigns the following:

First The same grounds heretofore assigned to the original complaint and each count thereof.

Second. The same grounds hereinabove assigned to the third count as amended.

Third. Because it appears from said count, and each of them, that plaintiff is a foreign corporation authorized to do business in this State, and is engaged in doing an interstate and intrastate business in this State, and that it is operating railroads in this State other than the railroad described in said count, and has and is employing in the transaction of its business in this State capital and property other than, and in addition to, that described in said count.

ALEX. M. GARBER,
Attorney General, for the Defendant.

H. C. SELHEIMER,
SAM'L D. WEAKLEY,
Special Counsel.

Filed in office this 9th day of Oct., 1908.
H. N. HUGHES, *Clerk.*

THURSDAY, *July 9th, A. D.* 1908.

Court met pursuant to adjournment.
Present: The Hon. A. D. Sayre, Judge Presiding.

4066.

THE LOUISVILLE & NASHVILLE RAILROAD CO.
vs.
JOHN B. GASTON.

Assumpsit.

Judgment.

This day came the parties by their attorneys and the defendant's demurrer to the complaint and each count thereof, being
122 argued by counsel and understood by the Court, and being considered by the Court, it is considered and ordered by the Court and it is the judgment of the Court that the said demurrer to the complaint and each count thereof, be and the same is hereby sustained.

THE STATE OF ALABAMA,
Montgomery County:

Organization of Court, October, 1908.

Be it remembered that at a term of the City Court of Montgomery begun and holden for said County at the Court House in the City of Montgomery, State and County aforesaid on the first Monday in October in the year of our Lord, One Thousand Nine Hundred and Eight, it being the fifth (5th) day of said month

Present: The Honorable A. D. Sayre, Judge Presiding.
The following proceedings were had and the following judgments were rendered, to-wit:

FRIDAY, *October 9th, A. D.* 1908.

Court met pursuant to adjournment.
Present: The Hon. A. D. Sayre, Judge Presiding.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation,
vs.
JOHN B. GASTON.

Assumpsit.

Judgment.

This day came the parties by their attorneys and by leave of the Court first had and obtained the plaintiff amends its complaint as shown by amendment filed on August 31st, 1908. And the defendant now refiles to amended complaint the grounds of demurrer filed to the original complaint and also additional grounds of demurrer as is shown by demurrer on file, and the defendant's demurrers to the amended complaint and each count thereof being argued by counsel and understood by the Court, and being considered by the Court, it is considered and ordered by the Court and it is the judgment of the Court that the said demurrers to the amended complaint and each count thereof, be and the same are hereby sustained. And the plaintiff declining to amend or plead further, it is considered and ordered by the Court and it is the judgment of the Court, that judgment be and the same is hereby rendered in favor of the defendant.

123

It is therefore considered and ordered by the Court that the defendant go hence and recover of the plaintiff the costs in this behalf expended for all of which let execution issue.

In the City Court of Montgomery.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

Prayer for Appeal.

Judgment having been rendered in favor of the defendant in the above entitled cause on the 9th day of October, 1908, the plaintiff hereby prays for an appeal to the next term of the Supreme Court of Alabama, and herewith files its bond as security for the costs of said appeal.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By GREGORY L. SMITH,
GEO. W. JONES,
J. M. FOSTER,
S. L. FIELD, *As Its Attorneys.*

Filed in office October 24th, 1908.

H. N. HUGHES, *Clerk*.

124 In the City Court of Montgomery.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

Bond.

Judgment having been rendered in favor of the defendant in the above entitled cause on the ninth day of October, 1908, in the City Court of Montgomery, and the plaintiff having prayed for and obtained an appeal to the Supreme Court of Alabama, the undersigned hereby acknowledge themselves as security for the costs of said appeal.

Witness our hands this 24th day of October, 1908.

GEO. W. JONES
J. M. FOSTER.

Approved this 24th day of October, 1908.

H. N. HUGHES,
Clerk City Court of Montgomery.

Filed in office Oct. 24th, 1908.

H. N. HUGHES, *Clerk*.

THE STATE OF ALABAMA,
Montgomery County.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Alexander M. Garber, Attorney of Record of John B. Gaston, to appear at the next term of the Supreme Court of said State, then and there to defend an appeal which Louisville & Nashville Railroad Company, a corporation has this day sued out, returnable to said Court to reverse a judgment which John B. Gaston at the October Term, 1908, of
125 the City Court of Montgomery recovered against Louisville & Nashville Railroad Company, and make immediate return of this writ, etc.

Witness Henry N. Hughes, Clerk of said City Court this 24th day of October, A. D., 1908.

H. N. HUGHES,
Clerk of the City Court of Montgomery.

Received in office Dec. 1st, 1908.

HORACE HOOD, *Sheriff*.

Executed by serving a copy of the within notice on A. M. Garber Attorney of Record for Defendant, this December 1st, 1908.

HORACE HOOD, *Sheriff*
Per W. A. HAYNES, *D. S.*

THE STATE OF ALABAMA,
Montgomery County:

Clerk's Certificate.

I, H. N. Hughes, Clerk of the City Court of Montgomery, do hereby certify that the foregoing pages numbered from one to one hundred and twenty-two inclusive, contain a full, true and complete transcript of the record and proceedings of said Court, in a certain cause lately therein pending wherein Louisville & Nashville Railroad Company, a corporation, was plaintiff and John B. Gaston was defendant, as fully and completely as the same appears of record in said Court.

And I further certify that the said plaintiff did on the 24th day of October, 1908, pray for and obtain an appeal from the judgment of said Court to the Supreme Court of Alabama, to reverse said judgment of said Court, by entering into bond for the costs of said Appeal with Geo. W. Jones and J. M. Foster, sureties thereon, which said bond has been approved by me.

Witness my hand this the 1st day of December, 1908.

H. N. HUGHES,
Clerk of the City Court of Montgomery.

126 Comes Appellant, the Louisville & Nashville Railroad Company, and says that there are manifest errors in the within record, and assigns the following:

1. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the first count of the complaint.
2. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the second count of the complaint.
3. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the third count of the complaint.
4. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the fourth count of the complaint.
5. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the fifth count of the complaint.
6. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the sixth count of the complaint.
7. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the seventh count of the complaint.
8. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the eighth count of the complaint.
9. In and by its decree of July 9th, 1908, the court erred in sustaining the defendant's demurrer to the ninth count of the complaint.
10. In and by its decree of October 9th, 1908, the court erred in

sustaining the defendant's demurrer to the third count of the complaint, as amended.

11. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to Count A of plaintiff's complaint.

127 12. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count B of plaintiff's complaint.

13. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count C of plaintiff's complaint.

14. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count D of plaintiff's complaint.

15. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count E of plaintiff's complaint.

16. In and by its decree of October 9th, 1908, the court erred in sustaining the defendant's demurrer to Count F of plaintiff's complaint.

17. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count G of plaintiff's complaint.

18. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count H of plaintiff's complaint.

19. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count I of plaintiff's complaint.

20. In and by its decree of October 9th, 1908, the court erred in sustaining the defendant's demurrer to count J of plaintiff's complaint.

21. In and by its decree of October 9th, 1908, the court erred in sustaining defendant's demurrer to count K of plaintiff's complaint.

22. In and by its decree of October 9th, 1908, the court erred in sustaining the defendant's demurrer to count L of plaintiff's complaint.

23. In and by its decree of October 9th, 1908, the court erred in sustaining the defendant's demurrer to count M of plaintiff's complaint.

128 24. In and by its decree of October 9th, 1908, the court erred in sustaining the defendant's demurrer to count N of plaintiff's complaint.

GREGORY L. SMITH,
H. L. STONE,
Attorneys for Appellant.

129 *Minutes Supreme Court of Alabama.*

December Term, 1908.

FRIDAY, *December 18th*, 1908.

The Court met pursuant to adjournment.

Present: Hon. Jno. R. Tyson, Chief Justice; Hon. J. R. Dowdell, Associate Justice; Hon. Jno. C. Anderson, Associate Justice; Hon. T. C. McClellan, Associate Justice.

3 Div., 802.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

Appeal from Montgomery City Court.

Come the parties by attorneys, and argue and submit this cause for decision.

Supreme Court of Alabama, November Term, 1908.

THURSDAY, *February 11th*, 1909.

The Court met pursuant to adjournment.
Present: All the Justices.

3 Div., 802.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

Appeal from Montgomery City Court.

130 Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed. It is also considered that the Appellant and Geo. W. Jones and J. M. Foster, sureties on the appeal bond pay the costs of appeal of this Court and of the City Court.

February 23rd, 1909.—Application for rehearing filed in this cause.

April 6th, 1909. It is ordered that the Application for rehearing in this cause be overruled, and the opinion modified.

131 APR. 6, 1909.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1908-9.

3 Div., 802.

LOUISVILLE & NASHVILLE RAILROAD CO.
v.
JOHN B. GASTON.

Appeal from Montgomery City Court.

SIMPSON, *J.:*

On the authority of *Southern Railway Company v. Samuel E. Greene*, in MS, the judgment of the court is affirmed. These cases were argued, submitted, and considered, together, and the points raised by the pleadings in each case are, for convenience, treated of and embodied in the one opinion.

Affirmed.

Dowdell, Denson, McClellan, and Mayfield, JJ., concur.

Anderson, J., dissents.

132 THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1908-9.

6 Div., 692.

SOUTHERN RAILWAY COMPANY
v.
SAMUEL E. GREENE.

Appeal from Birmingham City Court.

SIMPSON, *J.:*

This suit was brought by the appellant, against the appellee as Probate Judge of Jefferson County, to recover $22,458.36 which had been paid to said probate judge under protest, on account of the franchise tax required by Act of 1907, p. 418, sections 2361-2367 of the Code of 1907.

The complaint alleges that the plaintiff is a corporation, organized under the laws of Virginia, specially authorized by said laws to acquire railroad properties in other states, by either purchase or consolidation, and to use the same in the business of transporting passengers and freight, as a common carrier; that it commenced business July 1st, 1894, and has continued in business ever since, having

acquired various lines of railway in Virginia, North Carolina, Tennessee, Georgia, and other States; that it is and has been conducting both an interstate and intra-state business; that on July 16th, 1894 it filed in the office of the Secretary of State of Alabama a
155 copy of its charter and, at the same time, designated its principal place of business in said State, and an agent on whom process could be served, and paid to the Treasurer of the State of Alabama $250.00, being a full payment of the fee required by the provisions of an act to require all corporations to pay a fee or license for the use of the State, before commencing business in this State approved February 18th, 1893, and at once entered upon the business in said State for which it was chartered; also that it has paid the tax on franchise, or intangible property, required of all corporations by the Act of March 4th, 1907, section 2365 of Code of 1907; that between the time of commencing business and the year 1899, it purchased and acquired various lines of railroad in said State, connected with, and continuous of the other lines owned by it (which are described in the complaint); that it paid large sums of money for said lines, in reliance upon the then laws of Alabama, and has, since continuously operated said lines, transacting a large amount of business, interstate and intra-state, and has expended large sums in maintaining the same and in improvements and betterments; that it has, from year to year, paid all property taxes and license taxes required by law, including the license fee of ten dollars, by the Act of March 4th, 1907, required of foreign corporations only; that the tax required by the Act of March 7th, 1907, now complained of, is exacted of foreign corporations only; that the lines operated and owned by the plaintiff, in Alabama, were made the basis, in ascertaining the amount of said franchise tax due by plaintiff.

The complaint was demurred to, the demurrers were sustained and judgment was rendered for the defendant.

In order to determine the issues involved in this case, it is necessary, first, to ascertain the nature of the tax complained of, and specially, whether or not it is a tax on property—counsel, in argument, placing some emphasis on this point.

A franchise is a special privilege conferred by the government on individuals—*Bank of Augusta v. Earle*, 13 Pet. 519; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. 38.

In an early case, the Supreme Court of the United States said:

"A franchise is property, and nothing more; it is incorporeal
134 property, and is so defined by Justice Blackstone. * * *
It is its character of property only which imparts to it value and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment"—*West Bridge Co. v. Dix*, 6 Howard, 793, 797-8.

In another case, before the same court, in which it was held that a statute exempting all the property of a railroad corporation from taxation included the franchise, it was said: "Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—a property, and of the most valuable kind

as it cannot be taken, for public use even, without compensation. It is true it is not the same sort of property as the rolling stock, roadbed, and depot grounds, but it is equally, with them, covered by the general term, "the property of the company."—*Wilmington R. R. Co. v. Reid, Sh'ff*, 13 Wall. 264, 268.

The case just cited is quoted and reaffirmed in *Gulf & Ship Island R. Co. v. Hewes*, 183 U. S. 67, 77.

The case of *"The State v. Stonewall Ins. Co."* (89 Ala. 335) held merely that a tax on the "capital stock" of a corporation was a tax on property, and the court said: "Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether a tax is on the property, or the franchises, may be regarded generally uncertain and unsatisfactory. * * * The usual and most certain test is, whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation, in whatever it may be invested; if the former, it is a franchise tax; if the latter, a tax upon property" (p. 338).

In the case of *Phœnix Assurance Co. v. Fire Department of Montgomery* (117 Ala. 631), the act in question required all insurance companies, domestic and foreign, to pay two hundred dollars before taking any premium against fire, etc., and this court considered it a "privilege or occupation tax," the court saying: "Moreover it is well settled that limitations have relation to the taxation of property only—property which must be assessed according to its
135 value—and not to other subjects of taxation, such as privileges and occupations" (p. 646). Treating it as a privilege tax, it was upheld, the court saying: "The rule of uniformity does not require that all subjects be taxed or not be taxed alike; the requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind" (p. 653).

In the case of *Phœnix Cotton Co. v. State* (118 Ala. 143), the tax complained of was distinctly a privilege tax, levied only on those corporations not otherwise specifically required to pay a license tax, whether domestic or foreign. The validity of the tax was questioned by a domestic corporation, on the ground that it violated the uniformity provisions of our Constitution: 1st, because such privilege tax was not required of individuals doing a like business; and, 2nd, because it was not required of all corporations.

The tax was held to be valid, the court saying, it "has the properties and quality of a franchise tax—it is measured or graduated by the amount of the paid-up capital stock of the corporation, and this distinguishes it from a tax on property" (p. 151).

It will be observed that these cases refer to privilege or occupation taxes, which, as stated, are "annexed to the franchises as a royalty for the grant;" and it is stated that "the tax may be imposed on the creation of the corporation, but if the charter or grant of incorporation does not expressly exempt it from taxation, a tax on the franchise may be subsequently imposed at the will of the legislature," provided the equality and uniformity is observed which "consists in the imposition of the like tax upon all who engage in the avoca-

tion, or who may exercise the privilege taxed; and if it be a fran
chise tax upon all corporations belonging to the class upon whic
it is imposed" (pp. 151-2).

It was said in argument that the tax on a corporate franchise i
a tax on the right to be a corporation, but that is not correct, fo
the right to be a corporation is a right or franchise that belong
to the individuals who compose the corporation, and not to the co
poration itself. The franchises of the corporation are the rights
engage in and carry on the business for which it was chartered

Fietsam, Assignee, v. Hay, 13 N. E. 501, 502; *Cedar Rapi*
136 *Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083
Memphis & L. R. Co. v. Commissioners, 112 U. S. 609, 619

There are so many conflicting authorities, that it is a matter
considerable difficulty to know just where to draw the line betwee
a franchise as an asset of the corporation, and a franchise tax
synonymous with a license or privilege tax.

In a case in New York, where a tax was imposed on "the co
porate franchise or business" of all corporations, and it was soug
to be imposed upon a Pennsylvania corporation which had no pro
erty in New York, but had terminal facilities, such as wharves, pier
and docks, for receiving passengers and freight to be carried to
railroad in New Jersey, and an office for issuing tickets, etc., th
Court of Appeals held that the law was not violative of the inte
state commerce law, because the tax was not on the property, bu
on the "corporate franchise or business, by the express language
the enactment," and said: "The tax when imposed upon a domest
corporation, is a tax on its corporate franchise; when imposed
a foreign corporation is a tax on its business, a distinction based
the fact that corporate franchises are only taxable within the juri
diction which creates them and where alone they can be said
have a *situs*." *People ex rel. Penna. R. Co. v. Wemple*, 19 L. R.
694, 696-7.

In another case in which it was held that a tax on the "capit
stock" of a corporation did not mean the shares of stock in th
hands of the shareholders, but the capital owned by the corporatio
the court said: "The franchise of the company which may
deemed its business opportunity and capacity, is the property
the corporation;" also, "that the property of every company ma
consist of three separate and distinct things which are its capit
stock, its surplus, its franchises." *People ex rel. U. T. Co. v. Co*
man et al., 126 N. Y. 433, 437, 438.

In another case, in which the Supreme Court of the United Stat
affirmed the New York Court of Appeals in holding that this fra
chise tax was not a tax on the capital stock, and not invalid, in
far as bonds of the United States constituted a part of that sto
the court holds that the term "corporate franchise or busines
means "the right or privilege given by the State to two
137 more persons of being a corporation, that is of doing bu
ness in a corporate capacity, and not the privilege or fra
chise which, when incorporated, the company may exercise;" a
that the tax is not a tax on the capital stock or property of the co

pany, but upon its corporate franchise." *Home Ins. Co. v. New York*, 134 U. S., 594,, 599, 606.

It will be observed that the question at issue in the cases was not whether the corporate franchise is property, but whether it is identical with the tangible property which it represents. So really these decisions do not throw much light on the question as to whether the franchise of a corporation is, in and of itself, property.

In a late case, in which the Supreme Court of the United States held that certain provisions of the charter of a corporation did not prevent the State from levying a franchise tax, the court says: "The tax in question is a property tax, and the effect of the decision is to uphold a valuation of the whole property as a going concern." *Honolulu T. Co. v. Wilder*, 211 U. S. 137, 142.

Joyce, in his recent work on Franchises, draws the distinction between a franchise to *be*, and a franchise to *do*, but holds that both go with it wherever it goes as a corporation. He also speaks of them as "intangible properties."—Joyce on Franchises, § 39. He also speaks of the various names given in different States to charges imposed upon the franchise right of corporations to carry on their business within the State, and notes the conflicts; but states that, by whatever name called, the State has the power to impose conditions on foreign corporations, within certain limits, for doing business in the State.—Joyce on Franchises, § 356.

Mr. Gray, in his work on Limitations of Taxing Power, states that the franchise *to be*, and the franchise *to do*, may be taxed either as property or "by way of privilege, excise, or license taxation" (p. 31, § 17*a*). He seems to think that the law is in such a state of chaos, that, in many cases, it may be decided either way (pp. 38-9). He suggests a solution, to the effect that, when used as a noun, the word *franchise* indicates property, but when used as an adjective in the expression, "franchise tax," it indicates a privilege tax, and he says: "Where a tax is imposed in the shape of an annual charge or excise upon the right to *continued* corporate existence that also is not a property tax, but a privilege or license tax (pp. 40-41, §§ 53, 54, 55). After citing a number of cases, his summary is:

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"A tax on an occupation or business act generally, which might be carried on either by a corporation or by an individual, is a simple privilege tax etc.

"A specific tax on a domestic corporation, or one measured by the amount of earnings or dividends, or business done, is generally a privilege tax, and the privileges or franchises thus taxed may be both a privilege of continued corporate existence, and the privilege of doing business for which the corporation is organized, or either.

"A specific tax on a foreign corporation, measured by the amount of business done, or by the amount of receipts or earnings or dividends, is generally a tax on the privilege of doing business in the State. A tax on a domestic or foreign corporation which involves a valuation of property, by reference to the amount of capital stock, and an assessment upon such valuation, is generally a property tax, etc." (p. 53, § 67).

The conclusion is that, while a corporate franchise is pro
and a valuable asset of the corporation, yet the term *franchis*
may be used to indicate a license or privilege tax—in other wo
tax imposed by the State for the continued privilege of exerc
the franchise in the State.

In order to ascertain the meaning which the legislature atta
to the word, and the intent of the law, it becomes necessa
examine the several laws on the subject:

Section 2364 of the Code of 1907 provides that "There sha
subject to taxation, in this State, the franchises, or intangible
erty, and assets of each and every corporation, whether orga
under the laws of this State or of any other State or government.

Section 2365 provides for the same rate of taxation on thi
tangible property as on the tangible property, and the succe
sections provide for reports and statements, upon whic
139 value of such intangible property may be determined.

Section 2391 provides that "Every foreign corporation
thorized to do business in this State (with certain exceptions)
pay annually to a judge of probate of a county in which it
resident agent a franchise tax for the use of the State, and fo
amounts specified in the next succeeding section."

The succeeding section classifies them according to the am
of capital employed in the State, to-wit, on a corporation h
capital employed in this State of $100.00 or less, twenty-fiv
cent.; on those whose capital so employed exceeds $100.00 but
not exceed $1,000.00, twenty-five per cent. on the first $1
and five per cent. on the remainder, etc.

In accordance with the principles before adverted to, we a
opinion that the intention of this act was not to levy an a
ment on the franchises as property but to add to the licens
already required an additional privilege tax for the continue
ercise of the corporate franchises in the State.—*Spira et al. v.*
146 Ala. 177, 178.

The complaint shows that the appellant corporation paid
license fee required by law, when it complied with the other
ditions necessary to do business as a corporation in this
and also the annual license tax required by law. The payme
these fees conferred upon the individuals the right to be a cor
tion in Alabama, and upon the corporation the franchise to e
in the business for which it was organized, with the rights th
appurtenant, though it is not denied that the State may after
add a tax on the franchise, "as a royalty to the grant," in ac
ance with our decisions before cited. That royalty may be
in the shape of a tax on the franchise, as a valuable asset o
corporation, unless prohibited by some clause of the Constitu
or in the shape of a privilege tax for the continued exercise
franchise.

So the question arises, can the State, after a foreign corpor
has complied with previous laws, so as to be licensed to do bus
in the State as a corporation, has paid all annual licens
140 quired, and has paid all taxes on property, required of cor
tions, including a franchise tax, still require it to pay a

additional amount as a franchise tax, which is levied on foreign corporations alone?

The statement of this proposition would furnish its own answer, if the question arose between two individuals, residents of the State. The next inquiry therefore is, whether there is anything in the nature, position and standing of a foreign corporation which makes such a discrimination valid.

It is familiar law that a State may allow a foreign corporation to transact business within its limits, on such terms as it may please, or may exclude it entirely. The license, in the absence of special terms, is a mere revocable one, which may be recalled or burdened with additional restrictions provided the Constitution of the United States is not violated. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541, and cases cited; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 620; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 249.

Under the foregoing, and other authorities, the law in question is not violative of the clause in our constitution, nor of that in the United States Constitution, in regard to the impairing of the obligations of a contract, unless there are some special features connected with the granting of license to the corporation, which differentiate it from the ordinary case of a license granted to a corporation.

Section 1169 of the Code of 1896, under which the purchases in this case were made, provides that "such railroad so purchased shall be, in all respects, subject to the laws of this State, as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved."

A statute of Colorado, prescribing certain conditions necessary for a foreign corporation to enter the State, concluded with these words: "and such corporation shall be subjected to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character, organized under the general laws of this State, and shall have no other or greater powers."

141 After the corporation in question had complied with the provisions of the then law, and had invested a considerable amount in its business in said State, the legislature passed an act, placing upon domestic corporations a tax of two cents upon each thousand dollars of capital stock, and upon foreign corporations a tax of four cents on each thousand dollars of capital stock.

The Supreme Court of the United States held this act to be violative of the constitutional clause prohibiting any law impairing the obligation of a contract, the court saying: "These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were, or thereafter might be, imposed upon domestic corporations of like character." The court also says: "Nor is this a case where the power given by the state constitution

to the general assembly, to alter, amend or annul a charter, is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation, which, up to the time of its enactment, had been imposed on all foreign corporations doing business in the State."—*American Smelting Co. v. Colorado*, 204 U. S. 103, 112-13-14-15.

In a previous decision of that high court, written by the same Justice, it was held that a provision in the California Water Act of 1862, prohibiting county boards from reducing water rates below a certain point, did not create, with corporations thereafter incorporated, a contract which the State was bound by in subsequent legislation, and that the State could reduce the rates below that point without violating the contract clause of the Constitution. A number of cases are reviewed and analyzed in the opinion, and while the court holds that this power to amend is not without limit, even when reserved in the constitution of the state, and that sheer oppression and wrong could not be inflicted, under the guise of amendment or alteration, yet "a mere reduction of rates, while still leaving reasonable and fair compensation for the use of the property, is not prohibited."—*Stanislaus Co. v. San Joaquin C. & I. Co.*, 192 U. S. 201, 213. See also *Wisconsin etc. R. Co. v. Powers*, 191 U. S. 379, 383-386-7.

It will be noticed, in the Snelling Company case, the provision defining the status of the corporation, was in the act providing for the entry of the corporation into the state, so that, when the corporation complied with the terms, paid the entrance fee, and received its certificate, the contract was formed; while, in the case now under consideration, there were no such provisions in the statute under which the corporation entered the State, but only in the statute which authorized it to purchase the property of domestic corporations, and the claim of the appellant is that the general law of the State is incorporated into the contract between it and the selling corporation. It will be noticed also that section 1169 of the Code of 1896 does not say anything about what shall be the status or rights of the purchasing corporation, but only that "such railroad so purchased shall be in all respects subject to the laws of the State, etc."—

Section 23 of Article 1 of the Constitution of 1875 prohibited the State from making any "irrevocable grants of special privileges or immunities," and this was as much a part of the contract of purchase of the railroad property as was section 1169 of the Code of 1896.

We hold, then, that the act complained of is not violative of said section of the Constitution of 1875, nor of section 10 of Article 1 of the Constitution of the United States.

The only effect of the act complained of, is to recall or revoke so much of the privilege granted, as authorized the foreign corporation to do an intra-state business. The corporation remains the same, and the railroad the same, and the pleadings in this case do not raise any issue as to the result of the tax's working "oppression and wrong."

The fact that section 242 of the Constitution places certain duties on railroad companies, has no bearing on this question, for, if the

State itself prohibits the corporation from doing intra-state business it could not be subjected to liability for not doing it.

143 The Act does not interfere with the interstate business of the railroad company, and there is nothing in the pleading to raise the question that the enforcement of the statute would interfere with the interstate business. Therefore the Act is not invalid on that account.—*Osborne v. Florida*, 164 U. S. 650.

The next instance of the appellant is that the act complained of is violative of that provision of the Fourteenth Amendment to the Constitution of the United States which provides that "No state shall * * * deny to any person, within its jurisdiction, the equal protection of the laws."

It is settled by the decisions of the Supreme Court of the United States that, while a corporation is not a "citizen," within the meaning of that instrument, yet it is a "person," within its terms.

There cannot be any controversy as to the point that a corporation of another state, which has complied with the laws of this state, so that process can be served upon it, and paid the fees required for the privilege of doing business in this State, and also purchased property in the State and entered upon the transaction of the business authorized, is "within" the "jurisdiction" of the State.—*Blake v. McClung*, 172 U. S. 239. In fact, the claim of the State to impose a tax on the corporation, carries with it an admission that it is within the jurisdiction of the State.

In a case where a state board of equalization assessed the franchise and other property of a corporation, at a different rate and by different methods, so as to result in "an enormous disparity and discrimination between the various assessments on corporations," it was held to be a violation of the Fourteenth Amendment.—*Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37-8.

An act regulating the charges in stock yards of certain size, was held to be violative of the Fourteenth Amendment, because there was only one stock yard of that size in the state, the court saying: "While recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protec-

144 tion is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast on the other.—*Cotting v. Kansas City etc. Co. v. Kansas*, 183 U. S. 79.

In another case deciding that the State has a right to fix conditions upon which a corporation may do business in the State, and holding that a corporation is not a citizen, the court says that the object of the Fourteenth Amendment is "to prevent any person or class of persons from being singled out, as a special subject of discrimination and hostile legislation. Under the designation of *person* there is no doubt that a private corporation is included. * * * The equal protection of the laws which these bodies may claim is only such as is ac-

corded to similar associations, within the jurisdiction of the State" *Pembina M. Co. v. Pennsylvania*, 125 U. S. 181, 188-9.

In another case, while sustaining the right of the State, as a purely police regulation to prohibit laundry work in certain localities, the court, commenting on the Fourteenth Amendment, said, among other things, that it requires "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others, under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."—*Barbier v. Connally*, 113 U. S. 27, 31; *Bell's Gap R. Co. v. Penna.*, 134 U. S. 238; Gray's Limitations of Taxing Power, §§1114-1115.

The Supreme Court of Kentucky, while holding that a corporation is not a "citizen", and may have imposed upon it such conditions as the state may choose to require, yet said, "If any state, * * * should allow a corporation of another State to transact business as a corporation within its limits, and to acquire property there, the rights and property thus legally acquired, being held by the corporators, may be entitled to the same protection, under this clause of the Constitution, as if held by the corporators themselves."—Commonwealth *v.* Milton (12 B. Mon. 212); 54 Am. Dec. 522, 529-530.

On the other hand, the Supreme Court of Iowa sustains the
145 right of a state to impose a higher tax on foreign corporations than is imposed on domestic corporations, basing its conclusions partly on the general principle that the state has absolute power over foreign corporations, and partly on a misunderstanding to the effect that, in the *Pembina Case* (125 U. S. 180), the Supreme Court of the United States had held that a corporation is not a "person," when in fact the decision in that case is that although a corporation is not a "citizen," it is a "person" (op. 189).—*Scottish etc. Ins. Co. v. Herriott* (109 Iowa, 605); 77 Am. St., 548, 555.

The case of *Paul v. Virginia* (8 Wall. 168), which is frequently referred to in the decisions, came up on an application for a license, and was based on the principle that a corporation is not a citizen.

The Supreme Court of Illinois held that the state may rightfully discriminate against a foreign insurance company, in levying taxes (*Ducat v. City of Chicago*, 48 Ill. 172), and that decision was affirmed by the Supreme Court of the United States *Ducat v.* Chicago, 10 Wall. 410. It is true that this decision rests upon other provisions of the United States Constitution relating to "citizens," and no mention is made of the Fourteenth Amendment, yet said Fourteenth Amendment was then in force.

The Supreme Court of California held that, after a foreign corporation was permitted to do business in that state, the state could not impose upon it conditions not imposed upon citizens, under the uniformity clause of the California statute.—*San Francisco v. Liverpool etc. Ins. Co.* (74 Cal. 113) 5 Am. St. Rep. 425.

The annotator in Cyc., referring to this case, says, "However this may be it is clear that it violates no principle of the Federal Constitution, as the Supreme Court of California seems to suppose" 19 Cyc. 1228.

Upon the whole, while we are free to confess that this point makes a deep impression on our minds, yet this is a matter which should be passed upon by the Supreme Court of the United States, and we hold that the decisions are not so clear as to authorize this court to declare the act in question violative of the Fourteenth Amendment to the Constitution of the United States.

146 The second section of the Act (1907, p. 421) is not violative of section 45 of the Constitution of 1901. The title of the Act is sufficient to cover the levy for the county purposes, the same being referrible and cognate to the general subject of providing revenue for the state. If there were no mention of the counties the commissioners' court of each county could levy a tax for such county.—Code, 1907, § 2155.

The judgment of the court is affirmed.

Bowdell, Denson, McClellan, and Mayfield, JJ., concur.

Anderson J., dissents.

(Over.)

147 ANDERSON, *J.* (Dissenting)

I agree with my brethren upon the proposition that all doubts should be resolved in favor of the validity of the act assailed, when the assailant has the right of appeal to the Supreme Court of the United States, and that the State's right to do so is questionable. I do not think, however, that the infirmity of the act in question is open to serious doubt; and notwithstanding the high regard I have for the opinion of my associates, the infirmity of the act is to me so glaring that I deem it my imperative duty to construe the law as I understand it—regardless of consequences or whether the State has, or has not, the right of appeal.

Pretermitting the other questions insisted upon by appellants, against the validity of the Act in question, I am of the opinion, that it is violative of the Fourteenth Amendment to the Federal Constitution, in that the classification attempted is so unreasonable and unjust as to amount to a discrimination against one and in favor of other members of the same class. The classification has no reference to the subject or business but is based solely on the residence of the corporation. There can be no doubt, that the states have the right to require certain things of foreign corporations as a condition precedent to doing business therein, but when they enter the state, upon its invitation, and after complying with its requirements, they are entitled to the equal protection of the law and which includes a guaranteed uniformity in taxation. To my mind equal protection is not accorded when one railroad is taxed thousands of dollars more than others of equal value and similarly situated, the only distinction being that one is a foreign and the other a domestic corporation, notwithstanding the tax may be designated as a franchise tax in order to avoid the influence of the State Constitution against unequal taxation on property. That the state may levy a reasonable franchise tax on corporations there can be no doubt, but it has no right to levy such a tax on one and relieve another engaged in the

same identical business, simply because one is foreign and the other is domestic. The right of the state to prescribe conditions
148 upon which a foreign corporation should enter refers to the tax imposed for the privilege of acting in a corporate capacity in the state. "It does not mean that, after the corporation has been admitted into the state and paid the charge exacted for admission, it is not entitled to due process of law or the equal benefit of the laws, under the Federal Constitution, or equality and uniformity under the state government. The situation is therefore analogous to that of a domestic corporation. The state may impose such exaction as it pleases as a condition for granting the corporate franchise, but when the corporation is organized, its property is to be taxed as other property, subject to such classification and qualification as may lawfully be made."—Judson on Taxation, §168.

It may be that the state has the right to prevent the doing of intrastate business by a non-submitting corporation, and which is the penalty prescribed by the statute; but it must be borne in mind that we are dealing with the state's right to collect and retain this illegal tax and not with its right or recourse against the plaintiff for resisting the right to collect and retain said tax.

The question before us is, was the tax lawfully levied? If it was, the plaintiff cannot recover, if not legal it can recover it back. What the state can and will do for a refusal to submit we are not called upon to decide, "sufficient unto the day is the evil thereof," as we are dealing with the right to levy and collect and not the penalty for a refusal to submit. Should the state attempt to deprive many of her citizens dependent solely on foreign corporations for a means of travel and transportation, because said corporations do not submit to an unjust discrimination, will, of course, work a hardship upon many of her inhabitants and deprive them of the advantages and conveniences of the present age of progress and enterprise, and which cannot be taken from their more fortunate neighbors situated on domestic lines, and would create a condition to be deplored. But this threatened and impracticable disaster should not deter courts from condemning all laws of an unjust and discriminatory character such as the one in question.

I regret my inability to concur in the conclusion of my
149 brothers and am constrained to voice my protest against this statute as it involves not only a year's taxation but a principle so far reaching and important as to not only affect the integrity of the State but threaten the sacred rights secured by our Federal Constitution. Citation of authority is not required to demonstrate the inequality of this law and that the classification therein attempted is unreasonable and unjust. Nor do I feel it necessary to comment on many of those mentioned in the opinion but will content myself with a short discussion of what seems to be the three leading cases relied upon as supporting the conclusion of the majority.

The case of *Duval v. Chicago*, 10 Wall. 110, does not apply to the present question. There the Fourteenth Amendment was not considered, and while the case may have been decided subsequent to the adoption of same, the statute considered was enacted prior to the

amendment and the alleged violation of same was anterior to said amendment.

The cases of *New York v. Roberts*, 171 U. S. 658 and *Horn Silver Mining Co. v. New York*, 143 U. S. 305, do not support the law in question. The statutes there considered, dealt with foreign and domestic corporations in the same manner. Indeed, the opinion in each case is guarded on this point and stresses the fact, that there was no discrimination against foreign corporations, simply because they were foreign instead of domestic. In the *Horn Silver Mining Co., case, supra*, the court, speaking through Justice Field says: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation." And in the *Roberts case, supra*, we find the following guarded expression: "It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the State." It is therefore inferable that the statute would have been condemned had it discriminated against foreign corporations of the same class as the domestic ones and which is done by the law in question.

I dissent from the conclusion of the majority and think this tax was illegal and the plaintiff should recover it back.

150 In the Supreme Court of Alabama.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOHN B. GASTON, Appellee.

I, Robt F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the annexed writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 149, both inclusive, contain a true, full and complete transcript of the record and proceedings had in said Court, in the case of Louisville & Nashville Railroad Company, appellant *vs.* John B. Gaston, appellee (3rd Division No. 862), together with a true and correct copy of the opinion of the Court in said cause, and also a true and correct copy of the opinion of the said Supreme Court in the case of Southern Railway Company *vs.* Samuel E. Greene, appealed from the Birmingham City Court, as the same appears of record on file in this office.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed at the Capitol, in the City of Montgomery, Alabama, on this the 4th day of May, 1909, A. D.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

151 Copy.

In the Supreme Court of the United States, October Term, 1908.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
JOHN B. GASTON.

To the Honorable Chief Justice of the Supreme Court of the State of Alabama:

The petition of the Louisville & Nashville Railroad Company, a corporation, respectfully shows that the City Court of Montgomery, wherein was pending a suit in which the said Louisville & Nashville Railroad Company, as plaintiff, sued to recover of John B. Gaston, as defendant, the sum of Twenty-three Thousand Six Hundred Fifty-nine and 82/100 Dollars ($23,659.82) on the 9th day of October, 1908, rendered a judgment "that the defendant go hence and recover of the plaintiff the costs in this behalf expended, for which let execution issue;" that from said judgment the said Louisville & Nashville Railroad Company prayed and obtained an appeal to the Supreme Court of Alabama, and that on the 6th day of April, 1909, the said Supreme Court of Alabama which was and is the highest court of said State in which a decision in said suit would be had, rendered its judgment affirming the said judgment of the City Court of Montgomery.

152 Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the provisions of Section 709 of the Revised Statutes of the United States, because in and by said suit there was drawn in question the validity of a statute of the State of Alabama, viz.: The Act of the Legislature of the State of Alabama approved March 7, 1907, and entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," upon the ground that it, the said Act, is repugnant to the Constitution of the United States, and that the said judgment and decision of the Supreme Court of Alabama, for the removal whereof to the Supreme Court of the United States a writ of error is prayed, is in favor of the validity of said Act.

The said Louisville & Nashville Railroad Company, by its Attorneys, claimed and contended in said City Court of Montgomery when said cause was there pending, and in said Supreme Court of Alabama when said cause was there pending,—

1. That said Act of the Legislature of Alabama is repugnant to Section 10 Article I. of the Constitution of the United States, in that it impairs the obligations of certain contracts between the

153 State of Alabama and the Louisville & Nashville Railroad Company, and also the obligations of certain contracts between the Louisville & Nashville Railroad Company and other rail-

oad corporations organized under the laws of the State of Alabama, s follows:

The Louisville & Nashville Railroad Company was incorporated nder the laws of Kentucky on March 5, 1850, and has ever since een a corporation under the laws of said State. Under amendments o its charter by the laws of Kentucky approved March 6, 1878, and anuary 27, 1880, it became authorized and empowered to purchase, ease, own, control and manage railroads in the State of Alabama, nd in other states, and has ever since continued to be so authorized nd empowered.

By the Act of the Legislature of the State of Alabama approved ebruary 18, 1891, it was provided as follows:

SECTION 1. Be it enacted by the General Assembly of Alabama, That in all cases in which all of the capital stock of a railroad company chartered under the laws of the State of Alabama is owned by a railroad company chartered by the laws of another state, it shall be lawful for such railroad company in this state to sell and convey to such railroad company owning its stock, all of its property, roadbed, rights and franchises: Provided, that said company purchasing said railroad shall keep an office and an agent in the State of Alabama, and that said railroad so purchased shall be in all respects subject to the laws of Alabama as if owned by a domestic corporation: And provided further that all liens on such railroad, and the rights
154 of creditors, shall be preserved unimpaired.

Said Act remained in full force and effect until the adoption of the Code of Alabama of 1896, viz.: 17th day of February, 1898.

In and by Sections 1169 and 1170 of said Code it was provided as follows:

1169. Whenever all of the capital stock of a railroad corporation chartered under the laws of this state is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock all of its property, roadbed, rights and franchises; but the purchasing corporation shall keep an office and an agent in this state; and such railroad so purchased shall be, in all respects, subject to the laws of this state as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired.

1170. A corporation, chartered under the laws of this or any other state heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of the laws of this or any other state, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines

are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has
155 been called by the directors thereof, at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person, or by proxy, and voting thereat, shall have assented thereto.

The said Section 1169 of the Code of Alabama was thereafter amended by an Act approved February 7, 1899, so as to read as follows:

SECTION 1. Be it enacted by the General Assembly of Alabama, that Section 1169 of the Code, shall be, and the same is hereby amended so as to read as follows, viz.: 1169, 'Domestic may sell its property and franchise to foreign corporation.—Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, roadbed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another state, owning or operating by lease or otherwise, any railroad in this State, to purchase at judicial sale or otherwise, or to lease and hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock of the property, road beds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either directly, or by means of an intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad, so purchased or leased, shall be in all respects, subject to the laws of this State as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized."

The Montgomery & Prattville Railroad Company was a corporation organized under the laws of the State of Alabama, and owned
156 a railroad in said State, and on March 9, 1896, sold and conveyed all of its property, including said railroad and its franchises to the Louisville & Nashville Railroad Company, which at the time of said sale owned all of the capital stock of the Montgomery & Prattville Railroad Company.

The Tennessee Alabama Central Railroad Company was a corporation organized under the laws of the State of Alabama, and constructed, owned and operated a railroad from what is known as the Memphis and Chattanooga Junction, in the State of Alabama, northwardly to the Tennessee line. Said railroad was consolidated with another railroad corporation, formed under the laws of Tennessee, thereby creating the Nashville & Decatur Railroad Company, which owned a railroad extending from Nashville, in the State of Tennessee,

to the Memphis and Chattanooga Junction, in the State of Alabama. The said Nashville & Decatur Railroad Company with the assent or approval of a majority in interest of the stockholders present at a meeting thereof, on the 18th day of October, 1899, leased to the Louisville & Nashville Railroad Company all of its property and franchises for a term of nine hundred and ninety-nine years. 26.12 miles of the railroad so leased to the Louisville & Nashville Railroad Company was constructed by said Alabama corporation, and
157 is in the State of Alabama. At the time of the execution of said lease the Louisville & Nashville Railroad Company owned and was operating a line of railroad which was connected or continuous with the line of said Nashville & Decatur Railroad Company.

The Southern Alabama Railroad Company was a railroad corporation organized under the laws of Alabama, and owned and operated a railroad therein. On December 11, 1899, the Louisville & Nashville Railroad Company owned all of the capital stock of said Southern Alabama Railroad Company, and said latter Company on said date sold and conveyed to the said Louisville & Nashville Railroad Company all of its property and franchises, including 109.29 miles of main line railroad operated in the State of Alabama.

The Alabama & Florida Railroad Company was a corporation duly organized under the laws of Alabama, and owned and operated a railroad in said State. On December 17, 1900, the Louisville & Nashville Railroad Company owned all of the capital stock of said Alabama & Florida Railroad Company, and on said date purchased and received from said Company a conveyance of all of its property and franchises.

158 The Mobile & Montgomery Railway Company was a corporation organized under the laws of the State of Alabama and owned and operated a railroad therein. On the 17th day of December, 1900, the Louisville & Nashville Railroad Company owned all of the capital stock of the Mobile & Montgomery Railway Company, and on said date purchased and received a conveyance of all of its property and franchises.

The Nashville, Florence & Sheffield Railroad Company was a corporation organized under the laws of the State of Alabama, and owned and operated a railroad in said State. On April 10, 1900, the Louisville & Nashville Railroad Company owned all of the capital stock of said Nashville, Florence & Sheffield Railroad Company, and on said date purchased and received a conveyance of all of its property and franchises.

The North Alabama Railroad Company was a corporation organized under the laws of Alabama, and owned and operated a railroad in said State. On December 15, 1900, the Louisville & Nashville Railroad Company owned all of the capital stock of said North Alabama Railroad Company and on said date purchased and received a conveyance of all of its property and franchises.

159 The Birmingham, Selma & New Orleans Railroad Company was a railroad corporation organized under the laws of Alabama, and owned and operated a railroad therein. On Sep-

tember 10, 1900, the Louisville & Nashville Railroad Company owned all of its capital stock, and on said date purchased and received a conveyance of all of its property and franchises.

The Alabama Mineral Railroad Company was a railroad corporation organized under the laws of Alabama, and owned and operated a railroad in said State, and on the 29th day of September, 1903, the Louisville & Nashville Railroad Company owned all of its capital stock, and on said date purchased and received a conveyance of all of its property and franchises.

The Birmingham Mineral Railroad Company was a corporation duly organized under the laws of Alabama, and owned and operated a railroad in said State. On January 11, 1904, the Louisville & Nashville Railroad Company owned all of its capital stock and on said date purchased and received a conveyance of all of its property and franchises.

The New Orleans, Mobile & Texas Railroad Company, as reorganized, was a corporation organized under the laws of Ala-
160 bama, and owned and operated a railroad in said State. On the 29th day of April, 1880, the Louisville & Nashville Railroad Company owned all of its capital stock, and on said date purchased and received a conveyance of all of its property and franchises.

The several properties and franchises so purchased and leased from several domestic corporations each on the 1st day of January, 1908, and thereafter, constituted a part of the railroad with which it, the said Louisville & Nashville Railroad Company, was doing business in Alabama when said Act of the Legislature of Alabama approved on March 7, 1907, was passed, and with which the Louisville & Nashville Railroad Company has ever since done business, and now does business, in the State of Alabama, and constituted parts of the actual amount of capital employed by it in the State of Alabama within the meaning of said Act of March 7, 1907.

And the said Louisville & Nashville Railroad Company claims

a. That in and by each of said purchases a contract was made and entered into by and between the State of Alabama and it, the said Louisville & Nashville Railroad Company, whereby said Company became entitled to own and operate said properties, and to exercise the said franchises (so purchased by it) in the State of Ala-
161 bama, without being subjected to any burdens that could not have been lawfully placed upon the use of said property and the exercise of said franchises had they remained the property and franchises of the said domestic corporations from which they were purchased, and that said Act of March 7, 1907, violates the obligation of said contracts in that it imposes unjust burdens upon the ownership and use of said properties and the exercise of said franchises that would not rest upon the ownership and use of said properties and the exercise of said franchises if still owned by the corporations from which they were so purchased, and is, therefore, repugnant to and violates the provisions of Section 10, Article 1, of the Constitution of the United States; and in and by its said complaint the said Louisville & Nashville Railroad Company claimed

ion of said provisions of the Constitution of the United
ust the imposition of said burdens and against liability
by said act imposed.
in and by the grant of franchises to own and operate a
the State of Alabama to each of said corporations whose
d franchises were sold to the Louisville & Nashville Rail-
any contracts were made and entered into by and between
l corporations and said State, whereby each of said cor-
ations acquired the right to exercise its said franchises
out being subjected to any unjust burdens other than
e that were imposed upon other corporations of like char-
r the same circumstances, and in and by the sales and
s of said properties and franchises to the Louisville and
Railroad Company said contracts with the State of Ala-
lawfully assigned to the said Louisville and Nashville
ompany, and that the said act of March 7, 1907, violates
ions of said contracts in that it undertakes to impose upon
said properties and the exercise of said franchises bur-
nposed upon domestic corporations of the same class and
a like business, and is, therefore repugnant to and
provisions of Section 10, Article I, of the Constitution
ited States; and in and by its said complaint the said
and Nashville Railroad Company claimed the protection
visions of the Constitution of the United States against
tion of said burdens and against liability to the tax by
posed.
in and by the purchases of said properties and franchises
several domestic corporations, the Louisville and Nash
e Railroad Company lawfully made and entered into con-
ts with said several domestic corporations whereby it be-
e entitled to have and enjoy the ownership and use of
properties and to the exercise of their said franchises to
xtent as the same was owned and used by said domestic
, and the said Act of March 7, 1907, violates the obliga-
id contracts, in that it imposes upon the ownership and
properties and the exercise of said franchises unjust bur
ould not have been lawfully imposed upon said property
ises if the same had remained the property and franchises
orations from which the said Louisville & Nashville Rail-
any acquired the same, without imposing like burdens
roperties and franchises of all domestic corporations doing
kind of business under the same circumstances, and is,
repugnant to and violates the provisions of Section 10,
f the Constitution of the United States; and in and by its
laint the said Louisville & Nashville Railroad Company
e protection of said provisions of the Constitution of the
ates against the imposition of said burdens and against
the tax by said act imposed.
. The said act of the Legislature is repugnant to the
rteenth Amendment of the Constitution of the United
s in that it deprives the Louisville and Nashville Rail-

105

road Company of its property without due process of law, and denies to it the equal protection of the law.

a. In and by the provisions of an act of the Legislature approved February 18, 1891, and of sections 1169 and 1170 of the Code of Alabama, of 1896, and of the said laws amendatory thereof, the Louisville and Nashville Railroad Company as to the properties and franchises purchased by it from domestic corporations as hereinabove stated, became a person within the jurisdiction of the State of Alabama, within the meaning of the said Fourteenth Amendment of the Constitution of the United States, and that the State of Alabama parted with the right to arbitrarily exclude it from the right to do business in said State with said property and franchises, and that the said Act of March 7, 1907, imposes arbitrary burdens upon the use by the said Louisville & Nashville Railroad Company of the properties upon and the exercise by it of the franchises purchased by it from domestic corporations, as aforesaid, and is, therefore, repugnant to and violates the provisions of the Four-
165 teenth Amendment of the Constitution of the United States, and in and by its said complaint the said Louisville & Nashville Railroad Company claimed the protection of the said provisions of the Constitution of the United States against the imposition of said burdens and against liability to the tax by said act imposed.

b. That the Louisville and Nashville Railroad Company, with the consent of the State of Alabama, had during all of the period from July 1, 1872, and prior to February 29, 1908, done all that a foreign corporation was required by the Constitution and laws of Alabama to do in order to authorize it to do business in the State of Alabama, and to that end it had a known place of business, namely, Montgomery County in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument of writing under its corporate seal and signed officially by its President and Secretary, designating a known place of business in the State of Alabama and an authorized agent residing thereat; that it had also paid in each year at the time prescribed by the laws of Alabama its annual license tax to be paid by foreign corporations doing business in Alabama, and had received a license from the Secretary
166 of State authorizing it to continue to do business in that State as a common carrier railroad for all years prior to and during the year 1908; that it had qualified in good faith to do business in that State prior to July 1, 1872, and had ever since that date owned and operated, and at the institution of its said suit owned and operated in said business in said State many millions of dollars in value of railroad and a large equipment and that if not permitted to do an intrastate business in Alabama it could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless; that it had thereby become a person within the jurisdiction of the State of Alabama, within the meaning of the provisions of Sec-

One (1) of the Fourteenth Amendment to the Constitution of United States, and had been since July 1, 1872; and that under s, and because of the excessive and onerous penalties provided d act, and especially because of the provision therein that "no gn corporation required to pay a tax under this Act shall do usiness in the State of Alabama not constituting interstate com- , or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same e due," it had paid the sum sued for in its said suit under t, and that said act approved March 7, 1907, deprives it the Louisville & Nashville Railroad Company, of its property without process of law, and denies to it the equal protection of the in that it imposes upon the use by the said Louisville & Nash- Railroad Company of its property and the exercise of its fran- in the State of Alabama unjust burdens not imposed upon stic corporations of the same class engaged in the same busi- under the same circumstances and is, therefore, repugnant to violates the provisions of Section One (1) of the Fourteenth ndment to the Constitution of the United States, and in and said complaint the said Louisville & Nashville Railroad Com- claimed the protection of the said provisions of the Constitu- f the United States against the imposition of said burdens and st liability to the tax by said act imposed.

The said Act of the Legislature of the State of Alabama ap- l March 7, 1907, constitutes an unlawful interference with tate commerce.

the purchase of the several railroads and franchises of domestic corporations hereinabove referred to the Louisville & Nashville Railroad Company obtained the right and assumed the obligation to use said properties in one inseparable business common carrier of interstate and intrastate commerce in the of Alabama, and became further bound by the provisions of Constitution and Laws of Alabama to carry on the business of mmon carrier, both of interstate commerce and intrastate com- e; that it is engaged in one inseparable business of a common r of interstate and intrastate commerce in the State of Alabama. that the said Act of March 7, 1907, imposes upon said in- able business unjust burdens not imposed upon domestic cor- ions engaged in the same kind of business under like circum- es, and is, therefore, an unlawful interference with and a regu- of interstate commerce and is violative of clause three of on right of Article One of the Constitution of the United States. he said Louisville & Nashville Railroad Company, claimed pro- n under the said provisions of the Constitution of the United s against such interference with the interstate commerce in h it was engaged and against liability to the tax by said act im- .

of which appears of record of said proceedings in said cause, h is herewith submitted.

169 Wherefore, your petitioner prays for an allowance of a writ of error, returnable into the Supreme Court of the United States and for citation; and it will ever pray, and so forth.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner*,

(Signed) By GREGORY L. SMITH,
H. L. STONE,
Attorneys for Petitioner.

Filed this April 28th, 1909.
ROB'T F. LIGON,
Clerk Supreme Court of Alabama.

170 In the Supreme Court of Alabama, Third Division.

No. 802.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
versus
JOHN B. GASTON Defendant in Error.

This, the 28th day of April, 1909, came the plaintiff in error, the Louisville & Nashville Railroad Company, and filed herein and presented to me, James R. Dowdell, the Chief Justice of the Supreme Court of Alabama, the above petition praying for the issuance of a writ of error intended to be urged by it, and praying also that a transcript of the record, proceedings, and papers under which the judgment herein was rendered by the Supreme Court of Alabama duly authenticated, may be sent to the Supreme Court of the United States, and that such other or further proceedings may be had as may be necessary in the premises.

On consideration whereof, the said writ of error is hereby allowed upon the plaintiff in error, the Louisville and Nashville Railroad Company, giving bond according to law in the sum of Two
171 Thousand Dollars, which bond being forthwith given and approved, let the writ of error issue as prayed for.

This the 28th day of April, 1909.

(Signed) J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

Filed in office this 28th day of April 1909.
ROB'T F. LIGON,
Clerk Supreme Court of Alabama.

172 Know all men by these presents, That We, the Louisville & Nashville Railroad Company, as principal, and Benjamin J Baldwin and F. Stollenwerck, as sureties, are held and firmly bound unto John B. Gaston in the full and just sum of Two Thousand Dollars ($2,000.00), to be paid to the said John B. Gaston, his certain attorneys, executors, administrators or assigns, and which payment well and truly to be made we bind ourselves, our heirs, executors and administrators firmly and severally by these presents.

Sealed with our seals and dated this the 28th day of April, in the ear of our Lord one thousand nine hundred and nine.

Whereas, at the present session of the Supreme Court of Alabama a suit pending in said court between the Louisville & Nashville ailroad Company as Appellant, and John B. Gaston as Appellee, a nal judgment was rendered against the said Louisville & Nashville ailroad Company, and the said Louisville & Nashville Railroad ompany having obtained the allowance of a writ of error and filed copy thereof in the Clerk's Office of the said Court to reverse the dgment in the aforesaid suit, and a citation directed to the said John B. Gaston, citing and admonishing him to be and ap-
73 pear at the Supreme Court of the United States at Washington within thirty days thereof:

Now, the condition of the above obligation is such, that if the said ouisville & Nashville Railroad Company shall prosecute said writ f error to effect, and answer all damages and costs in full if it fail make its plea good, then the above obligation to be void; else to emain in full force and virtue.

LOUISVILLE & NASHVILLE RAILROAD CO.,

(Signed) By GREGORY L. SMITH,
Its Attorney of Record and in Fact. [L. S.]
BENJ'N J. BALDWIN. [L. S.]
F. STOLLENWERCK. [L. S.]

Sealed and delivered in the presence of
S. L. FIELD.

Approved by
J. R. DOWDELL,
Chief Justice Supreme Court of Alabama.

Filed in office this 28th day of April 1909.
ROB'T F. LIGON,
Clerk Supreme Court of Alabama.

74 UNITED STATES OF AMERICA:

o John B. Gaston, Greeting:

You are hereby cited and admonished to be and appear at the upreme Court of the United States, at Washington, within thirty ays from the date hereof, pursuant to a writ of error filed in the lerk's Office of the Supreme Court of the State of Alabama, wherein he Louisville & Nashville Railroad Company, a corporation is plainff in error, and you are defendant in error, to show cause, if any here be, why the judgment rendered against the said plaintiff in rror as in the said writ of error mentioned, should not be corrected, nd why speedy justice should not be done to the said parties in that behalf.

Witness the Honorable James R. Dowdell, Chief Justice of the

Supreme Court of Alabama, this the 28th day of April, in the year of our Lord, one thousand nine hundred and nine.

J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

STATE OF ALABAMA,
County of Montgomery:

On this the 28th day of April, in the year of our Lord one thousand nine hundred and nine, personally appeared Gregory L. Smith, before me, the subscriber, a Notary Public, and makes oath
175 that he delivered a true copy of the within citation to John B. Gaston, the defendant in said cause.

GREGORY L. SMITH.

Subscribed and sworn to before me the 28th day of April, A. D. 1909.

[Seal Henry T. Bartlett, Notary Public, Montgomery Co., Ala.]

HENRY T. BARTLETT,
Notary Public, Montgomery County, Alabama.

Filed in office this 28th day of April, 1909.

ROB'T F. LIGON,
Clerk Supreme Court of Alabama.

176 UNITED STATES OF AMERICA:

President of the United States to the Honorables the Judges of the Supreme Court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a suit which is in the said Supreme Court of Alabama before you, or some of you, being the highest court of law and equity in said State in which a decision could be had in said suit between the Louisville & Nashville Railroad Company as Appellant, and John B. Gaston, as Appellee, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such validity; a manifest error has happened, to the great damage of the said Louisville & Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment therein be given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
177 together with this writ, so that you have the same in the Supreme Court at Washington within thirty days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein

correct that error what of right and according to the laws and cus-
ms of the United States should be done.
Witness the Honorable Melville W. Fuller, Chief Justice of the
nited States, the 28th day of April, in the year of our Lord one
housand nine hundred and nine.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the United States Circuit Court
for the Middle District of Alabama.

Allowed by
J. R. DOWDELL,
Chief Justice of the Supreme Court
of the State of Alabama.

Filed in office this 28th day of April, 1909.
ROBT F. LIGON,
Clerk Supreme Court of Alabama.

178 STATE OF ALABAMA,
County of Montgomery:

On this the 28th day of April, in the year of our Lord one thousand nine hundred and nine, personally appeared Gregory L. Smith, before me, the subscriber, a Notary Public in and for said State and County, and makes oath that he delivered a true copy of the within writ of error to John G. Gaston.

GREGORY L. SMITH.

Sworn to and subscribed the 28th day of April A. D. 1909.

[Seal Henry T. Bartlett, Notary Public, Montgomery Co., Ala.]

HENRY T. BARTLETT,
Notary Public, Montgomery County, Alabama.

Filed in office this 28th day of April, 1909.
ROBT F. LIGON,
Clerk Supreme Court of Alabama.

179 Supreme Court of the United States.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
versus
JOHN B. GASTON, Defendant in Error.

Assignment of Errors.

Feeling itself aggrieved by the proceedings and judgment of the Supreme Court of Alabama in the above entitled cause, comes the plaintiff in error, the Louisville and Nashville Railroad Company,

by its Counsel, and says that manifest error has been committed in the records and proceedings in said cause, and assigns the following:

The Supreme Court of Alabama, in and by its judgment rendered in said cause, erred in affirming the judgment rendered by the City Court of Montgomery, wherein said City Court of Montgomery sustained the demurrers of the Defendant in Error, John B. Gaston, to the original and amended complaints in said cause, and rendered judgment for the defendant thereon.

180 1. In and by the complaint filed in said cause and the demurrers of the defendant thereto, there was drawn in question the validity of an Act of the Legislature of the State of Alabama, approved March 7, 1907, entitled

"An Act to provide for the Revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax,

as violative of Section 10, Article 1, of the Constitution of the United States, in that

a. It violated the obligations of certain contracts between the plaintiff in error and the State of Alabama, arising out of the purchase by the plaintiff in error of the properties and franchises of certain domestic railroad corporations of the State of Alabama, and in that

b. It violated the obligations of certain contracts between plaintiff in error and certain railroad corporations organized under the laws of the State of Alabama, arising out of the sale by such Alabama corporations of their property and franchises to the plaintiff in error, the Louisville & Nashville Railroad Company, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and

181 does not violate Section 10 of Article 1 of the Constitution of the United States.

2. In and by the complaint filed in said cause, and the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff in error, the Louisville & Nashville Railroad Company, of its property without due process of law, and denies to it the equal protection of the laws, in that said Act imposes upon the plaintiff in error, the Louisville and Nashville Railroad Company, which was and is a person within the jurisdiction of the State of Alabama, burdens not imposed upon corporations organized under the laws of said State, and engaged in a like business under the same circumstances, and in and by affirming the judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and does not violate the provisions of

the said Section of the Fourteenth Amendment of the Constitution of the United States.

3. In and by the complaint filed in said cause and the de-
182 murrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, in that said Act operates as an interference with the regulation of Interstate Commerce by Congress, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that the said Act of the Legislature of the State of Alabama, is valid and does not constitute an interference with the regulation of Interstate Commerce by Congress.

Wherefore, the said Louisville and Nashville Railroad Company prays that the said judgment of the Supreme Court of Alabama be reversed.

(Signed) GREGORY L. SMITH,
H. L. STONE,
Counsel for Louisville and Nashville Railroad Company, Plaintiff in Error.

Presented with the petition for the writ of error and filed this 28th day of April, 1909.

ROBT. F. LIGON,
Clerk of the Supreme Court of Alabama.

183 In the Supreme Court of Alabama, Third Division.

No. 802.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
versus
JOHN B. GASTON.

It is hereby certified that this Supreme Court of Alabama is the Court of Last Resort of said State, and the highest court of law in the State of Alabama to which the matters presented by the annexed record can be presented or in which a decision thereof can be had.

It is further hereby certified that by a judgment of this court rendered on the sixth day of April, 1909, the judgment of the City Court of Montgomery rendered in said cause was affirmed, and that said judgment of the City Court of Montgomery so affirmed was rendered in an action of assumpsit wherein the Louisville and Nashville Railroad Company, the Appellant in this court, was the plaintiff; that therein, the Louisville and Nashville Railroad Company, the Appellant in this court, sued said John B. Gaston, the Appellee in this court, to recover the sum of $23,659.82 alleged in the complaint to have been paid under protest and
184 duress by the Appellant to the Appellee, as the Judge of the Probate Court of Montgomery County, Alabama, as a franchise tax demanded and collected by said Appellee for the year 1908

under and pursuant to the terms of an act of the legislature of the State of Alabama, approved March 7, 1907, which reads as follows:

An Act to provide for the revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax.

SECTION 1. *Be it enacted by the Legislature of Alabama*, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State, is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceeds One thousand dollars shall pay an annual franchise tax of twenty-five per centum on the first One hundred dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of One Hundred Dollars
185 and up to and including One thousand Dollars, and one tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over and above One Thousand Dollars. E. The President or other executive head, and the Secretary of every foreign corporation subject to a tax under this Act, shall make a written statement under their oath, to the Judge of Probate showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation

may appeal from his finding to the Circuit Court in the same manner as may be done when the court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such case. F. No foreign corporation which has paid the tax required under this Act, shall be required to pay the taxes imposed by Subdivision 24 of Section 1122 of the Code of 1896 as amended by an Act of the General Assembly entitled an Act to further amend the Revenue Laws of the State of Alabama, approved March 5th, 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall
186 have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this act to pay a franchise tax, which corporation shall have paid the license taxes for this current year as provided by the corporation laws now in force in this State shall be required to pay a franchise tax under this Act before the first day of January, 1908. I. The payment of the franchise tax required by this act, in any one county shall be sufficient, notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

SECTION 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the County Treasurer for the use of the County."

It is further certified that in and by its complaint in said cause, Appellant claimed, among other things, that said sum was unlawfully demanded of it, because said act of the Legislature of Alabama was and is in contravention of the Constitution of the United States, and, therefore, null and void, for the following reasons:

First. That it was and is repugnant to the provisions of Section 10, Article I of the Constitution of the United States in that:

a. It impaired and impairs the obligations of certain contracts existing between the State of Alabama and the Appellant the
187 said Louisville and Nashville Railroad Company.

b. It impaired and impairs the obligation of certain contracts between certain railroad corporations organized under the laws of Alabama and Appellant, the said Louisville and Nashville Railroad Company.

It is further certified that by an Act of the Legislature of the State of Alabama, approved February 19, 1891, it was provided as follows:

"SECTION 1. Be it enacted by the General Assembly of Alabama,

that in all cases in which all of the capital stock of a railroad company chartered under the laws of the State of Alabama is owned by a railroad company chartered by the laws of another state, it shall be lawful for such railroad company in this state to sell and convey to such railroad company owning its stock all of its property, roadbed, rights and franchises: Provided, that said company purchasing said railroad shall keep an office and an agent in the State of Alabama, and that said railroad so purchased shall be in all respects subject to the laws of Alabama as if owned by a domestic corporation; And provided further, that all liens on such railroad, and the rights of creditors, shall be preserved unimpaired."

It is further certified that said act remained in force until the adoption of the Code of Alabama of 1896, and that in and by sections 1169 and 1170 of said code, it was provided as follows:

1169. Whenever all of the capital stock of a railroad corporation chartered under the laws of this state is owned by a railroad corporation chartered by the laws of another state, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock all of its property, roadbed, rights and franchises: but
188 the purchasing corporation shall keep an office and an agent in this state; and such railroad so purchased shall be, in all respects, subject to the laws of this state, as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired.

1170. A corporation chartered under the laws of this or any other state heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of the laws of this or any other state, may lease or purchase any part or all of any railroad construct*ing* by any other corporation or company, if the lines of such road are continuous or connected, upon such terms or conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines are so connected, may enter into any arrangements for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof, at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company represented at such meeting, in person, or by proxy, and voting thereat, shall have assented thereto."

It is further certified that said section 1169 of the Code of Alabama of 1896 was amended by an act approved February 7, 1897, so as to read as follows:

"An Act to Amend Section 1169 of the Code.

SECTION 1. Be it enacted by the General Assembly of Alabama, that Section 1169 of the Code shall be, and the same is hereby amended so as to read as follows: 1169. 'Domestic may sell its property and franchise to foreign corporation. Whenever all of the capital stock of a railroad corporation chartered under the laws
189 of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, roadbed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another state, owning or operating by lease or otherwise, any railroad in this state to purchase at judicial sale or otherwise, or to lease and to hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock or of the property, roadbeds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either directly or by means of an intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this state, and such railroad, so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized."

It is further certified that in and by its complaint in said cause, Appellant alleged and claimed as follows, that:

The Montgomery and Prattville Railroad Company was a corporation organized under the laws of the State of Alabama, and owned a railroad in said State, and on March 9, 1906, sold and conveyed all of its property, including said railroad, and its franchises to the Louisville and Nashville Railroad Company, which, at the time of said sale, owned all of the capital stock of the Montgomery and Prattville Railroad Company.

190 The Tennessee Alabama Central Railroad Company was a corporation organized under the laws of the State of Alabama and constructed, owned and operated a railroad from what is known as the Memphis and Charleston Junction in the State of Alabama, northwardly to the Tennessee Line. Said railroad was consolidated with another railroad corporation formed under the laws of Tennessee, thereby creating the Nashville and Decatur Railroad Company which owned a railroad extending from Nashville in the State of Tennessee to the Memphis and Charleston Junction in the State of Alabama. The said Nashville and Decatur Railroad Company, with the consent and approval of a majority in interest of the stockholders present at a meeting thereof, on the 18th day of October, 1899, leased to the Louisville and Nashville Railroad Company all of its property and franchises for a term of 999 years. 26.42 miles of the railroad so leased to the Louisville and Nashville Railroad Company was constructed by said Alabama corporation and is in

the State of Alabama. At the time of the execution of said
the Louisville and Nashville Railroad Company owned an
operating a line of railroad which was connected or continuou
the line of said Nashville and Decatur Railroad Compa
191 The Southern Alabama Railroad Company was a r
corporation organized under the laws of Alabama, and
and operated a railroad thereunder. On December 11, 189
Louisville and Nashville Railroad Company owned all of the
stock of said Southern Alabama Railroad Company, and said
company, on said date, sold and conveyed to the said Lou
and Nashville Railroad Company all of its property and fra
including 109.29 miles of main line railroad operated in the
of Alabama.

The Alabama Florida Railroad Company was a corporatio
organized under the laws of Alabama, and owned and oper
railroad in said state. On December 17, 1900, the Louisvil
Nashville Railroad Company owned all of the capital stock
Alabama and Florida Railroad Company, and on said dat
chased and received from said corporation a conveyance of al
property and franchises.

The Mobile and Montgomery Railway Company was a c
tion organized under the laws of the State of Alabama, and o
a railroad therein. On the 17th day of December, 1900, the
ville and Nashville Railroad Company owned all of the
stock of the Mobile and Montgomery Railway Co
192 and on said date purchased and received a conveya
all of its property and franchises.

The Nashville, Florence and Sheffield Railroad Company
corporation organized under the laws of the State of Alabam
owned and operated a railroad in said State. On April 10,
the Louisville and Nashville Railroad Company owned all
capital stock of said Nashville, Florence and Sheffield Railroa
pany, and on said date purchased and received a conveyance
of its property and franchises.

The North Alabama Railroad Company was a corporati
ganized under the laws of Alabama and owned and operated
road in said state. On December 15, 1900, the Louisville and
ville Railroad Company owned all of the capital stock
North Alabama Railroad Company, and on said date purchas
received a conveyance of all its property and franchises.

The Birmingham, Selma and New Orleans Railroad Co
was a railroad organized under the laws of Alabama and own
operated a railroad therein. On September 10, 1900, the
ville and Nashville Railroad Company owned all of its capital
and on said date purchased and received a conveya
193 all its property and franchises.

The Alabama Mineral Railroad Company was a r
corporation organized under the laws of Alabama, and own
operated a railroad in said state and on the 29th day of October
the Louisville and Nashville Railroad Company owned all
capital stock, and on said date purchased and received a conv
of all of its property and franchises.

The Birmingham Mineral Railroad Company was a corporation organized under the laws of Alabama, and owned and operated a railroad in said state. On January 11, 1904, the Louisville and Nashville Railroad Company owned all of its capital stock, and on said date purchased and received a conveyance of all of its property and franchises.

The New Orleans, Mobile, and Texas Railroad Company, as reorganized, was a corporation organized under the laws of Alabama, and owned and operated a railroad in said state. On the 29th day of April, 1880, the Louisville and Nashville Railroad Company owned all of its capital stock, and on said date purchased and received a conveyance of all of its property and franchises.

In and by the several charters of the railroad companies,
194 the properties and franchises of which were purchased or leased by the Louisville and Nashville Railroad Company as hereinbefore stated, the right was conferred and the duty imposed upon each of said companies to receive and transport for hire or compensation over its railroad as a public highway and by said company as a common carrier, passengers and freight tendered to them for transportation from points within the State of Alabama to other points within said State, and between points in the State of Alabama and points in other states, and to receive and transport freight and passengers and cars loaded or empty, of other railroads doing business in Alabama which were being transported from one point in the State of Alabama to another point in said state, and also freight and passengers and cars, loaded or empty, of other railroad being transported between points in the State of Alabama and points in other states.

The several properties and franchises so purchased and leased from said several domestic corporations each, on the first day of January, 1908, and thereafter, constituted a part of the railroad with which it, the said Louisville and Nashville Railroad Company, was doing business in Alabama, when said act of the Legislature of Alabama, approved March 7, 1907 was passed, and with which
195 the Louisville and Nashville Railroad Company has ever since done business and now does business in the State of Alabama, and constituted parts of the actual amount of capital employed by the State of Alabama within the meaning of said act of March 7, 1907, and upon the amount of which the defendant assessed and collected the tax for the recovery of which said suit was brought.

It is further certified that in and by said complaint, the Louisville and Nashville Railroad Company claimed and insisted as follows:

a. That in and by each of said purchases a contract was made and entered into by and between the State of Alabama and it, the said Louisville and Nashville Railroad Company, whereby said company became entitled to own and operate the said properties and to exercise the said franchises (so purchased by it) in the State of Alabama without being subjected to any burdens that could not have been lawfully placed upon the use of said properties and the exercise of said franchises, had they remained the properties and franchises of the domestic corporation from which they were purchased, and that

said act of March 7, 1907, violates the obligation of said contract, in that it imposes unjust burdens upon the ownership and use of said properties and the exercise of said franchises that would not
196 rest upon the ownership of said properties and the exercise of said franchises if still owned by the corporation from which they were so purchased, and is, therefore, repugnant to and violates the provisions of Section 10, Article 1, of the Constitution of the United States, and in and by its said complaint, the said Louisville and Nashville Railroad Company claimed the protection of said provisions of the Constitution of the United States against the imposition of said burdens and liability to the tax by said act imposed.

b. That in and by the grant of franchises to own and operate a railroad in the State of Alabama made by the State of Alabama to each of said corporations whose property and franchises were sold to the Louisville and Nashville Railroad Company, contracts were made and entered into by and between said several corporations and the State of Alabama, whereby each of said corporations acquired the right to exercise its said franchises without being subjected to any unjust burdens other than those which were imposed upon domestic corporations of like character under the same circumstances, and in and by the sales and conveyances of said property and franchises to the Louisville and Nashville Railroad Company, said con-
197 tracts with the State of Alabama were lawfully assigned to said Louisville and Nashville Railroad Company, and that the said act of March 7, 1907 violates the obligation of said contracts in that it undertakes to impose upon the use of such properties and the exercise of such franchises burdens not imposed upon domestic corporations of the same class and engaged in a like business, and is, therefore, repugnant to, and violates, the provisions of Section 10, Article 1 of the Constitution of the United States and in and by its said complaint the said Louisville and Nashville Railroad Company claimed the protection of said provisions of the Constitution of the United States against the imposition of said burdens and against liability to the tax by said act imposed.

c. That in and by the purchase of the properties and franchises of said several domestic corporations, the Louisville and Nashville Railroad Company lawfully made and entered into contracts with said several domestic corporations, whereby it became entitled to have and enjoy the ownership and use of their said properties and to the exercise of their said franchises to the same extent as the same was owned and enjoyed and exercised by said domestic corporations, and that the said act of March 7, 1907, violates the obligations of
198 said contracts in that it imposes upon the ownership and use of said several properties and the exercise of said several franchises unjust burdens that could not have been lawfully imposed upon said properties and franchises if the same had remained the properties and franchises of the corporations from which the said Louisville and Nashville Railroad Company acquired the same without imposing like burdens upon the property and franchises of all domestic corporations doing the same kind of business under the same circumstances, and is, therefore, repugnant to, and violates the

provisions of Section 10, Article I, of the Constitution of the United States, and in and by its said complaint, the said Louisville & Nashville Railroad Company claimed the protection of said provisions of the Constitution of the United States against the imposition of said burdens and against liability to the tax by said act imposed.

It is further certified that the said Louisville & Nashville Railroad Company in and by its said complaint set up and claimed that

Second. The said act of the Legislature is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the Louisville and Nashville Railroad Company of
199 its property without due process of law, and denies to it the equal protection of the laws as follows:

a. In and by the provisions of the act of the Legislature, approved February 18, 1891, and of Sections 1169 and 1170 of the Code of Alabama of 1896 and of the said laws amendatory thereof, the Louisville and Nashville Railroad Company, for the purpose of owning and operating the properties and exercising the franchises purchased by it from domestic corporations as hereinabove stated, became and was a person within the jurisdiction of the State of Alabama within the meaning of said Fourteenth Amendment of the Constitution of the United States, and that the State of Alabama parted with the right to arbitrarily exclude it from doing business in said State with said properties and franchises, and that the said act of March 7, 1907, imposes arbitrary burdens upon the use by the said Louisville & Nashville Railroad Company of the properties and upon the exercise by it of the franchises purchased by it from domestic corporations aforesaid, and is, therefore, repugnant to and violates the provisions of the Fourteenth Amendment of the Constitution of the United States; and in and by its said complaint, the Louisville & Nashville Railroad Company claimed the protection of said provisions of the Constitution of the United States against the
200 imposition of said burdens and against liability to the tax by said act imposed.

b. That the Louisville and Nashville Railroad Company with the consent of the State of Alabama, had since the year 1872, and during all of the period from that date, and prior to February 29, 1908, done all that a foreign corporation was required by the Constitution and laws of Alabama to do in order to authorize it to do business in the State of Alabama, and to that end it had a known place of business namely, Montgomery County in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument of writing under its corporate seal and signed officially by its President and Secretary, designating a known place of business in the State of Alabama, and an authorized agent residing thereat; that it had also paid in each year at the time prescribed by the laws of Alabama its annual license tax to be paid by foreign corporations doing business in Alabama, and had received a license from the Secretary of State authorizing it to continue to do business in that State as a common carrier railroad for all years prior to and during the year 1908,

that it had qualified in good faith to do business in that State
201 prior to July 1, 1872, and had ever since that date owned and operated, and at the institution of its said suit owned and operated in said business in said State many millions of dollars in value of railroad and a large equipment, and that if not permitted to do an intrastate business in Alabama it could not earn with said property the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless; that it had thereby become a person within the jurisdiction of the State of Alabama, within the meaning of the provisions of Section One (1) of the Fourteenth Amendment to the Constitution of the United States, and had been since July 1, 1872; and that under duress, and because of the excessive and onerous penalties provided in said act and especially because of the provision therein that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became "due," it had
202 paid the sum sued for in its said suit under protest, and that said act approved March 7, 1907, deprives it, the said Louisville & Nashville Railroad Company, of its property without due process of law, and denies to it the equal protection of the laws in that it imposes upon the use by the said Louisville & Nashville Railroad Company of its property and the exercise of its franchises in the State of Alabama unjust burdens not imposed upon domestic corporations of the same class engaged in the same business under the same circumstances, and is, therefore, repugnant to and violates the provisions of Section One (1) of the Fourteenth Amendment to the Constitution of the United States, and in and by its said complaint, the said Louisville and Nashville Railroad Company claimed the protection of the said provisions of the Constitution of the United States against the imposition of said burdens and against liability to the tax by said act imposed.

It is hereby further certified that in and by Section 242 of the Constitution of the State of Alabama in force at the time of the adoption of said act of March 7, 1907, and thereafter, it is provided as follows:

203 "242. All railroads and canals not constructed and used exclusively for private purposes shall be public highways and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this State, and connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad and each shall receive and transport the freight, passengers and cars, loaded or empty, of the others, without delay, or discrimination."

It is further certified that by Section 3459 of the Code of Alabama

of 1896, which was in force until the adoption of the Code of 1907, it was provided as follows:

"3459 (1158). Railroads Public Highways.—The main track of every railroad in this State is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad."

And that by the said Code of 1907, it was provided as follows:

"5520. Railroad and Common Carriers Defined.—All railroads are public highways, and all corporations, companies, firms, or individuals engaged in the transportation of persons or freight over railroads for hire are common carriers."

"5549. Reception and Transportation of Freight and Cars Required and Provided for.—Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever
201 tendered at a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law or the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and shall forward the same without delay and within a compliance with such reasonable rules, regulations and requirements as may be prescribed by the railroad commission or by law, and upon the failure of any such railroad company or other common carrier doing business in this State to so receive and so transport goods, merchandise or property of any description, delivered to it for shipment to and from any points within the state in such reasonable time as the railroad commission or the law may prescribe unless otherwise agreed upon between the shipper and the company, or unless such property be burned, stolen, or otherwise destroyed, such railroad company or other common carrier shall forfeit to the party aggrieved such sum as may now or hereafter be prescribed by law for such delay, and, in addition, shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport."

It is further certified that in and by its complaint the Louisville and Nashville Railroad Company claimed

Third. That the said act of the Legislature of the State of Alabama approved March 7, 1907, constitutes an unlawful interference with interstate commerce, and is, therefore, violative of Clause 2 of Section 8 of Article I of the Constitution of the United States, as follows:

By the purchase of the several railroads and franchises of domestic corporations hereinabove referred to, the Louisville and Nashville Railroad Company claimed that it obtained the right and as-
205 sumed the obligation to use said properties in one inseparable business of a common carrier of intrastate and interstate commerce in the State of Alabama and became further bound by the provisions of the Constitution and laws of Alabama to carry on the business of a common carrier both of interstate commerce and of

intrastate commerce in the State of Alabama, and that it is and has for many years been engaged in one inseparable business of a common carrier of interstate and intrastate commerce in the State of Alabama, and that the said act of March 7, 1907, imposes upon said inseparable business unjust burdens not imposed upon domestic corporations engaged in the same kind of business under like circumstances, and is, therefore, an unlawful interference with, and regulation of, interstate commerce and is violative of clause 3 of section 8 of Article I of the Constitution of the United States; and the said Louisville and Nashville Railroad Company in and by its said complaint claimed protection under the said provisions of the Constitution of the United States against such interference with the interstate commerce in which it was engaged and against liability to tax by said act imposed.

It is further certified that each count of the plaintiff's com-
206 plaint in said cause was by the defendant demurred to, and that by said demurrers the said defendant, John B. Gaston, contended, among other things:

1st. That the said act of the Legislature of Alabama was not repugnant to section 10, Article I of the Constitution of the United States in that it did not impair the obligations of any contracts between the State of Alabama and the Louisville and Nashville Railroad Company or the obligations of any contracts between the Louisville and Nashville Railroad Company and other railroad corporations organized under the laws of the State of Alabama.

2nd. That the said act of the Legislature is not repugnant to the Fourteenth Amendment to the Constitution of the United States in that it did not operate to deprive the *the* Louisville and Nashville Railroad Company of its property without due process of law, or deny to it the equal protection of the law.

3rd. That the said act of the Legislature of the State of Alabama did not operate as an unlawful interference with interstate commerce.

It is further certified that the said demurrers were, by the
207 said City Court of Montgomery, sustained and the plaintiffs having declined to further amend their complaint, a judgment was rendered in favor of the defendant from which said judgment an appeal was taken to this Supreme Court of the State of Alabama, and the judgment of the said City Court of Montgomery sustaining the defendant's said several demurrers were duly assigned as error and the said several contentions made by the Appellant, the said Louisville and Nashville Railroad Company in said complaint duly presented and insisted upon in this court.

It is further certified that in and by the judgment of this Supreme Court, the judgment of the said City Court of Montgomery was affirmed.

It is further certified that the said judgment of affirmance by this court necessarily involved an adjudication that the said act the validity of which was drawn in question as aforesaid was valid and that it was not in contravention of any of the provisions of the Constitution of the United States by the Appellant, the Louisville and

Nashville Railroad Company, insisted upon in the said City Court of Montgomery and in this Supreme Court as aforesaid.

208 All of which fully appears by the record of said cause hereto appended.

This certificate is made part of the record.

Done this the 28th day of April, 1909.

(Signed) J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

Filed in office this 28th day of April, 1909.

ROBT F. LIGON,
Clerk Supreme Court of Alabama.

209 In the Supreme Court of Alabama.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOHN B. GASTON, Appellee.

I, Robt. F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the records and proceedings in said cause, together with the original writ of error, the original citation and proof of service, and copies of the petition for the writ of error, the order allowing the writ, the assignments of error, the writ of error bond, and certificate of Hon. J. R. Dowdell, Chief Justice of the Supreme Court of Alabama, duly certified and authenticated according to law, to the Honorable the Supreme Court of the United States.

In Testimony Whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed, at the Capitol, in the City of Montgomery, Alabama, on the 4th day of May, in the Year of Our Lord, One Thousand Nine Hundred and Nine.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 21,663. Alabama Supreme Court. Term No. 451. Louisville & Nashville Railroad Company, plaintiff in error, *vs.* John B. Gaston. Filed May 11th, 1909. File No. 21,663.

14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

~~No. 186~~.

CENTRAL OF GEORGIA RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN B. GASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MAY 20, 1909.

(21,690.)

(21,690.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 466.

CENTRAL OF GEORGIA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN B. GASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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1 TRANSCRIPT OF RECORD.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plaintiff in Error,
versus
JOHN B. GASTON, Defendant in Error.

In Error to the Supreme Court of the State of Alabama.

2 In the Supreme Court of Alabama.

3 Div. 803.

CENTRAL OF GEORGIA RAILWAY CO., Appellant,
vs.
JOHN B. GASTON, Appellee.

Appeal from Montgomery City Court.

THE STATE OF ALABAMA,
Montgomery County:

Be it remembered that at a term of the City Court of Montgomery, begun and holden for said County at the Court House in the City of Montgomery, State and County aforesaid, on the first Monday in October in the year of Our Lord One Thousand Nine Hundred and Seven, it being the 7th day of said month—present, the Honorable A. D. Sayre, Judge Presiding—the following proceedings were had and the following judgments were rendered, to wit:

THE STATE OF ALABAMA,
Montgomery County:

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon John B. Gaston, to appear before the City Court of Montgomery, in and for said County, at the place of holding the same, within thirty days from the service of this summons and complaint, then and there to demur or plead to the complaint of Central of Georgia Railway Company, a corporation organized and existing under the laws of the State of Georgia.

And you are hereby commanded to execute this process instanter and make return as required by law.

Witness my hand this 28th day of March A. D. 1908.

H. N. HUGHES, *Clerk.*

Complaint.

3 THE STATE OF ALABAMA,
Montgomery County:

In the City Court of Montgomery, October Term, 1907.

CENTRAL OF GEORGIA RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Georgia, Plaintiff,

vs.

JOHN B. GASTON, Defendant.

1. Plaintiff claims of the defendant the sum of Eleven Thousand Three Hundred and Seventy One and 44/100 ($11,371.44) Dollars, due to it for money on, to wit, the 29th day of February, 1908, received by the defendant to the use of the plaintiff, which said sum with interest thereon, is still due and unpaid.

". The plaintiff claims of the defendant the sum of Three Thousand, Seven Hundred and Ninety and 48/100 ($3,790.48) Dollars due to it for money on, to wit, the 29th day of February, 1908, received by defendant to the use of the plaintiff, the Central of Georgia Railway Company, which is a corporation organized and existing under the laws of the State of Georgia, and which was on, and for many years prior to said date, duly authorized and empowered to do business, and was doing business, in the State of Alabama as a common carrier by railroad, which sum of money, with interest thereon is still due and unpaid, and is the property of the plaintiff. Said money was demanded of the plaintiff by the defendant, as Judge of Probate of Montgomery County, as a franchise tax alleged to be due by the plaintiff under the second section of An Act of the Legislature of Alabama, approved March 7, 1907, known as House Bill No. 611, entitled "An Act to provide for the Revenue of the State, by requiring all foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax," which said section of said Act is violative of Section 45 Article 4 of the Constitution of the State of Alabama, and is void. And plaintiff avers that said sum was paid by it under duress, and to avoid the onerous and excessive penalties imposed by the provisions of said act for failing to pay said tax therein required. And plaintiff avers that said payment was made with notice by it to the

4 defendant not to pay over said money to the State of Alabama, or to the County of Montgomery, or to any person or party, other than the plaintiff, and that plaintiff would bring suit against him within a reasonable time, to recover the same, and plaintiff avers that the defendant still has said money in his possession;

Wherefore this suit.

3. The plaintiff the Central of Georgia Railway Company, claims of the defendant, J. B. Gaston, the sum of Three Thousand, Seven Hundred and Ninety and 48/100 ($3,790.48) Dollars, due to it for

money on, towit, the 29th day of February, 1908, received by defendant to the use of the plaintiff, the Central of Georgia Railway Company, which is a corporation organized and existing under the laws of the State of Georgia, and which was on, and for many years prior to said date, duly authorized and empowered to do business and was doing business, in the State of Alabama, as a common carrier by railroad, which sum of money, with interest thereon, is still due and unpaid, and is the property of the plaintiff. Said money was demanded of the plaintiff by the defendant as Judge of Probate of Montgomery County, as a franchise tax alleged to be due by the plaintiff under the second section of an Act of the Legislature of Alabama, approved March 7, 1907, known as House Bill 611, entitled "An Act to provide for the revenue of the State, by requiring all foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax" which said second section of said Act is violative of Sections 104, 105 and 106 of the Constitution of the State of Alabama, or one or more of said sections, in that said Act is in effect a local law, and void. And plaintiff avers that no notice of the intention to apply for the passage of said law was published in the manner provided and required by section 106 of the present Constitution of the State of Alabama. And plaintiff avers that said sum was paid by it under duress, and to avoid the onerous and excessive penalties imposed by the provisions of said Act for failing to pay said tax therein required. And plaintiff avers that said payment was made with notice by it to the defendant not to pay over said money to the State of Alabama, or to the County of Montgomery, or to any person or party, other than the plaintiff, and that plaintiff would bring suit against him within a reasonable time, to recover the same, and plaintiff avers that the defendant still has said money in his possession.

Wherefore this suit.

4. The plaintiff claims of the defendant the sum of Eleven Thousand Three Hundred and Seventy-one and 44 100 ($11,371.44) Dollars due to it for money on, towit: the 29th day of February 1908, received by the defendant to the use of the plaintiff, which with interest thereon, is still due and unpaid.

And plaintiff avers that it is, and for many years next preceding has been, a corporation organized and existing under the laws of the State of Georgia, duly authorized and empowered to do, and doing, business in the State of Alabama, as a common carrier by railroad; and plaintiff avers that said sum was demanded by the defendant, as Judge of Probate of Montgomery County, Alabama, as a franchise tax, alleged to be due by the plaintiff, under the provisions of the Act of the Legislature of Alabama, approved March 7th, 1907, known as House Bill No. 611, entitled "An Act to provide for the revenue of the State by requiring foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax", which said act, plaintiff avers, is violative of the Constitution of the State of Alabama.

And plaintiff avers that said sum was paid by it under duress and

for the purpose of avoiding the great penalties imposed by said act for the failure to pay the tax therein provided for. And plaintiff avers that at the time of the payment of said sum to the defendant, as said Judge of Probate, it notified the defendant not to pay over said sum of money to the State of Alabama, or to any other person or party than the plaintiff, and that plaintiff would bring suit against him within a reasonable time, to recover the same. And plaintiff avers that the defendant still has said money in his possession.

Wherefore this suit.

5. The plaintiff claims of the defendant the sum of
6 Eleven Thousand, Three Hundred and Seventy-one and 44/100 ($11,371.44) Dollars, due to it for money, on, towit, the 29th day of February, 1908, received by the Defendant to the use of the plaintiff which said sum, with interest thereon, is still due and unpaid.

And plaintiff avers that it is, and for many years next preceding has been, a corporation organized and existing under the laws of the State of Georgia, and authorized and empowered to do, and doing, business as a common carrier by railroad, in the State of Alabama. And plaintiff avers that said money was demanded by the defendant, as Judge of Probate of Montgomery County, Alabama, of the plaintiff, as a franchise tax alleged to be due by the plaintiff under the provisions of an Act of the Legislature of Alabama, approved March 7th, 1907, known as House Bill No. 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax." And plaintiff avers that said Act of the Legislature is violative of the fourteenth amendment of the Constitution of the United States and void; for that, it deprives the plaintiff of its property without due process of law, and denies to the plaintiff, which is a person within the jurisdiction of the State of Alabama, the equal protection of the law. And plaintiff further avers that it paid said money to the defendant, as Judge of Probate of Montgomery County, Alabama, under duress, and for the purpose of avoiding the great penalties imposed by said Act for failure to pay the same, and that at the time of said payment, plaintiff notified the defendant not to pay over said money to the State of Alabama, or to any other person or party than the plaintiff, and that plaintiff would bring suit against him within a reasonable time, to recover the same. And plaintiff avers that the defendant still has said money in his possession.

Wherefore, this suit.

6. The plaintiff, a foreign corporation, claims of the defendant, the sum of Three Thousand Seven Hundred and Ninety- and 48/100 ($3,790.48) Dollars, for money on, towit; the 29th day of
7 February, 1908, received by defendant to the use of the Central of Georgia Railway Company.

And plaintiff avers that on and for many years prior to said date, it was, and still is a corporation, organized and existing under the laws of the State of Georgia, and was and still is authorized and empowered to do business in the State of Alabama,

nder the laws of the State of Alabama, as a common carrier by ailroad, and was and is doing business as such common carrier by ailroad in the State of Alabama.

And plaintiff avers that the said sum of money was demanded f the plaintiff by the defendant as the Judge of Probate of Montomery County, Alabama, as a franchise tax, alleged to be due by id Central of Georgia Railway Company under the second secon of an Act of the Legislature of Alabama, approved March 7th, 907, known as House Bill 611, entitled: "An Act to provide for e revenue of the State by requiring all foreign corporations auorized to do business in this State under the laws of the State of labama, to pay an annual franchise tax," which said second secon of said Act is unconstitutional and void, in that the General ssembly, under the Constitution of Alabama, had no power or uthority to impose the tax therein mentioned for County purposes, nd further in that the tax therein provided for constitutes a subct not clearly expressed in the title of said Act, as required by ection 45 of the Constitution of Alabama.

And plaintiff further avers that said sum of Three Thousand even Hundred and Ninety and 48/100 ($3790.48) Dollars was art of an aggregate sum of Eleven Thousand, Three Hundred and eventy One and 44/100 ($11,371.44) Dollars, composed of Seven housand Five Hundred and Eighty and 96/100 ($7,580.96) Dolrs, alleged by the defendant, as Judge of Probate of Montgomery ounty, Alabama, to be due under the first Section of said Act, as franchise tax, for the use of the State of Alabama, and the said m of Three Thousand Seven Hundred and Ninety—and 48/100 $3,790.48) Dollars, alleged by said Judge of Probate to be due by e plaintiff, under the said second section for the use of the said ounty. And the plaintiff avers that the said Judge of Probate refused, and would not receive the said sum of Seven Thousand Five Hundred and Eighty and 96/100 ($7,580.96) Dollars alleged by him to be due under said Act for the use of e State of Alabama, without the payment to him of said entire m of Eleven Thousand Three Hundred and Seventy One and 4/100 ($11,371.44) Dollars, composed as aforesaid.

And plaintiff further avers that it was and is a foreign corporaon, within the meaning of said Act, and on and for many years ior to the date herein first mentioned, was authorized by the laws f the State of Alabama, to do and doing an interstate and intrate business as a common carrier railroad corporation, in the State f Alabama, and owned and operated in said business in said State, large sum of money, towit; more than a million dollars in value f railroads, and a large amount of equipment, and that if not pertted to do an interstate business in Alabama, plaintiff could not rn with said property the costs of operating the same, and the lue of said property would be thereby ruined, and rendered pracally valueless.

And plaintiff avers that under duress, by reason of the penalties at it would incur by failure to pay said sum due for the use of e State of Alabama, and especially because said statute provides;

that "no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama, not constituting inter-state commerce, or maintain or demand any action in any of the Courts of this State upon a contract made in this State, other than contracts based upon inter-state commerce, unless such corporation shall have paid such tax within sixty days after the same became due," plaintiff paid said entire sum, under protest, and forthwith notified the said defendant not to pay over said sum to the State of Alabama, or to any other person or party other than plaintiff, and that plaintiff would bring suit against him within a reasonable time to recover the same, and defendant still has said money. Copy of said notice and said protest is hereinafter set out in this complaint, and designated as Exhibit "B" and is made part of this count.

Wherefore this suit.

7. And plaintiff claims of the defendant the sum of Eleven Thousand Three Hundred and Seventy One and 44/100
9 ($11,371.44) dollars, for money, on towit, the 29th day of February, 1908, received by the defendant to the use of the plaintiff, the Central of Georgia Railway Company, which said sum of money with the interest thereon, is still due and unpaid.

And plaintiff avers that said money was so received by the defendant, as Judge of Probate of Montgomery County, Alabama, from plaintiff as aforesaid, as a franchise tax which the defendant demanded of the plaintiff, and alleged to be due under the provisions of an Act of the Legislature of Alabama, approved March 7th, 1907, known as House Bill, 611, entitled: "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax," which said Act of the Legislature, the plaintiff avers, is, as to the plaintiff, unconstitutional and void, being as it is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff of its property without due process of law and denies to the plaintiff, which is a person within the jurisdiction of the State of Alabama, equal protection of the laws.

Plaintiff further avers that it is, and for many years next preceding this date has been, a foreign corporation within the meaning of said Act, having been duly incorporated and organized under the laws of the State of Georgia, and was and is authorized and empowered to own, purchase, construct, lease, operate, control and maintain railroads in the State of Georgia and Alabama and other States, and is, and has for many years next preceding, been, under and by virtue of the laws of the State of Alabama, engaged in the business of a common carrier railroad corporation in this State, and is and has for many years next preceding, been doing both inter-state and intra-state business in the State of Alabama.

Plaintiff further avers that for many years next prior to February 29th, 1908, it had done all that it, as a foreign corporation, was required by the Constitution and Laws of the State of Alabama

to do, in order to authorize it to do business in the State of
10 Alabama, and to that end it had a known place of business in the State of Alabama, in the County of Montgomery in said State, and an authorized agent residing therein, and had filed with the Secretary of State of Alabama a certified copy of its charter, and also an instrument in writing, under its corporate seal, and signed officially by its president and secretary, designating a known place of business in the State of Alabama, and an authorized agent residing thereat; that it also paid each year at or within the time prescribed by the laws of the State of Alabama, its annual license tax to be paid by foreign corporations doing business in Alabama, and has received a license from the Secretary of State authorizing it to do business in the State of Alabama, as a common carrier railroad, for many years next prior to and during the year 1908.

Plaintiff further avers that it qualified in good faith to do business in the State of Alabama, as aforesaid, and has, ever since, owned and operated, and now owns and operates in said business in said State, many million of dollars in value of railroad, and a large equipment, and that if not permitted to do an intra-state business in Alabama, plaintiff could not earn with said property, the costs of operating the same, and the value of said property would thereby be ruined and rendered practically valueless; and plaintiff avers that under duress, and because of the excessive and onerous penalties provided in said Act, and especially because said Statute provided that: "No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama, not constituting interstate commerce, or maintain or demand any action in any of the Court of this State upon a contract made in this State, other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due" Plaintiff paid said sum under protest and forthwith notified the defendant that it would sue him to recover the same, a copy of which said protest and notice is hereinafter in this complaint set out, and designated as Exhibit "B" and is here referred to and made a part of this count and plaintiff avers that defendant still holds said money, and that said Act of the Legislature of Alabama, requiring plaintiff to pay the so-called
11 franchise tax demanded of and received from it by defendant, is unconstitutional and void, because, among other reasons, the imposition upon it of said so-called franchise tax is an unjust discrimination against it, and a denial of the equal protection of the laws, in that it is not imposed alike on all corporations and individuals within the jurisdiction of the State of Alabama engaged in the same class of business, but is imposed only on foreign corporations, within the jurisdiction of the State of Alabama, and authorized to do business therein, and is not imposed upon domestic corporations and individuals engaged in the same business, under substantially the same circumstances and no such tax, or similar tax, whatever is imposed for State and County purposes upon domestic corporations engaged in doing business as common carriers by railroad in the State of Alabama, either upon their capital

stock or any part thereof, or upon the actual amount of their capital employed in the State of Alabama.

Plaintiff further avers that by Section 229 of the Constitution of the State of Alabama, adopted towit, November 28, 1901, it is provided that the Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State (except strictly benevolent, educational, or religious corporations) which shall be in proportion to the amount of capital stock; and by section 232 thereof, it is provided that the Legislature shall, by general law, provide for the payment to the State of Alabama a franchise tax by foreign corporations (except strictly benevolent educational or religious corporations) but such franchise tax shall be based upon the actual amount of capital employed in this State.

Plaintiff further avers that the Act aforesaid, approved March 7, 1907, by which the Legislature of Alabama undertook to impose the so-called franchise tax herein complained of, was enacted by the Legislature of Alabama in pursuance of said section 232 of the said Constitution, which section, so far as it attempts to authorize the Legislature, by general law, to provide for the payment to the State of Alabama of a franchise tax by foreign corporations
12 authorized to do business in this State, and within the jurisdiction of this State, based upon the actual amount of capital employed in this State, without requiring the same tax on the same bases from domestic corporations of the State of Alabama authorized to do and doing business of the same or like character therein, constitutes a denial to plaintiff, (which had been authorized to do business in this State long prior to the adoption of the present Constitution of Alabama, and was then and has been ever since so engaged as a common carrier by railroad) of equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and is therefore unconstitutional and void so far as the same affects plaintiff herein, and plaintiff claims the protection of the provisions of the said first section of the fourteenth amendment of the Constitution of the United States, and the right thereunder to recover the money sued for.

And plaintiff states that continuously since it commenced to carry on its business as aforesaid in the State of Alabama there have been assessed against it, annually, on account of the ownership by it of property within the State of Alabama *ad valorem* taxes similar to those assessed against other persons and corporations owning like property, for the benefit of the State Counties, municipalities, and taxing districts or jurisdictions in this State, all of which the plaintiff has paid. It has also paid from year to year, the license tax exacted of it, and of other persons and corporations operating railroads in this State, under the provisions of Section 3489 of the Code of Alabama of 1896 up to and including the license tax based on gross earnings, imposed by said section of said Code, towit, June 1, 1907, for the year ending, towit, May 31, 1908, to pay the annual expenses of the Railroad Commission of Alabama, as authorized by law.

Plaintiff has also paid on account of such ownership and operated

of its railroads in Alabama, all the taxes assessed against it, under an Act of the Legislature of Alabama, approved March 4, 1907, known as House Bill 741, entitled: "An Act to make subject to taxation, and to tax the franchise or intangible property and assets of every person, association, Company and corporation engaged
13 as a common carrier in this State, in the business of transporting persons or property over any railroads, etc. or any other business which may be dependent upon the grant of public powers or privileges, or which may involve the operation of any public utility, and to provide for the valuation and manner of ascertaining the values of such franchise or intangible properties, and the distribution of the same for local taxation, and the levy, assessment and collection of said taxes thereon."

It has also paid the license fee and obtained the license provided for in the Act of the Legislature of Alabama, approved March 4, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama, by foreign corporations or non-resident corporations, or corporations organized under or by authority of the law of any other State or Government than the State of Alabama, and to fix a punishment for the violation thereof.

And plaintiff avers that all these exactions have been made by the State of Alabama upon corporations owning and operating a railroad in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized and existing under the laws of some other State, with the sole exception of the license fee last above mentioned, and which is a nominal amount ($10.00 per annum) and is exacted of foreign corporations only for as plaintiff is advised, mere police purposes, and in order that there may be a registration kept in the office of the Secretary of State of such foreign corporations doing business in Alabama.

To the contrary however, the Act of the Legislature approved March 7th, 1907, of which plaintiff is now complaining herein, and under which plaintiff was compelled to pay and did pay the sum of $11,371.44, does not apply, and was not intended to apply to any resident person or domestic corporation of the State of Alabama, owning the same character of property and carrying on the same kind of business in this State as is owned and carried on in this State by corporations organized and existing under the laws of another State, authorized to do and engage in doing business in this State, and which are within the jurisdiction thereof, nor is there any like or similar exaction by the laws of the State of Ala-
14 bama, of or against domestic corporations or resident individuals of this State, owning such or like property and engaged in such or like business.

And plaintiff avers and states that ever since the filing of its statement in writing with the Secretary of State of Alabama, designating its known place of business in the County of Montgomery, and an agent residing thereat, as its authorized agent in this State, as required by law, which was long prior to the adoption of the present

Constitution of the State of Alabama, and ever since filing with said Secretary of State a certified copy of its charter, or articles o incorporation as required by section 232 of that instrument, which it had done long prior to the enactment of the Statute herein com plained of, the plaintiff has been a person subject to and within the jurisdiction of the State of Alabama in the sense and meaning of section one of the fourteenth amendment to the Constitution o the United States; and that the State of Alabama has exercised it jurisdiction over the plaintiff continuously ever since the plaintiff began to do business, and to operate its railroads as a common carrier of freight and passengers in this State, in respect to all its properties and franchises situate within this State, that the State of Alabama has subjected plaintiff to the same laws to which resident persons and domestic corporations carrying on like similar business have been subjected, until the enactment of the Statute herein complained of; that under the laws of the State of Alabama, there has been created the Railroad Commission of this State, with large and ex tensive powers and authority over the plaintiff, and all other persons and corporations owning and operating railroads in Alabama, and said Commission has at divers times and continuously since the plaintiff began to carry on its business in the State of Alabama exercised its powers authority, and control over the plaintiff, in sundry ways, and to exactly the same extent and in the same manner as it exercised the same over other persons or corporations conducting the like or similar business or owning and operating railroads as common carriers of freight and passengers in Alabama.

And plaintiff states that the said act herein complained
15 of as construed by the defendant imposed a tax levied on the value of the plaintiff's property in Alabama, but is not equal and uniform nor levied nor assessed in exact proportions to the value of all like property within the State of Alabama, and when added to the other property taxes imposed by the laws of this State, constitutes a greater rate of taxation in each year for State purposes than sixty five one hundredths (65/100) of one per centum on the value of the taxable property within this State owned by the plaintiff.

Plaintiff further avers that the property tax imposed by the Act of March 7th, 1907, as construed by the defendant herein complained of, when added to other property taxes imposed by the County of Montgomery, for County purposes, constitutes a greater rate of taxation in each year for such purposes, on the value of the taxable property within this State, or in said County, owned by the plaintiff, than one half (½) of one per centum.

In construing said Act of March 7th, 1907, known as House Bill 511, herein complained of, the defendant as Probate Judge of Montgomery County, Alabama, found that "the actual amount of capital employed in this State" by the plaintiff, as the basis of the so-called franchise tax for State and County purposes therein provided for, was the assessed value of all of the plaintiff's tangible property situate within the State of Alabama consisting of its road bed, tracks, and rolling stock, as assessed for the last preceding tax year 1907, by the State Board of Assessment, and its depots, sectio

houses, real estate, tools etc., as assessed for the same year by the Tax Assessor of the several counties in which plaintiff has property situate, aggregating in all, to wit, $7,511,964.65.

And plaintiff further states and avers that said Act herein complained of as construed and enforced by the defendant against the plaintiff, as aforesaid, imposes a property tax on the property of private foreign corporations authorized and engaged in doing business in this State not at the same, but at a different rate than those imposed by the laws of the State of Alabama and County purposes for property in this State of other private corporations, asso-
16 ciations and individuals of this State, and in these respects, plaintiff avers that said Act violates sections 211, 214, 215 and 217 or one or more of said Sections of the Constitution of Alabama, and is therefore unconstitutional and void.

8. The plaintiff, the Central of Georgia Railway Company a corporation duly created by and existing under the laws of the State of Georgia, claims of the defendant, John B. Gaston, the sum of Nine Thousand, Six Hundred and Twelve and 69 100 ($9612.69) Dollars received by the defendant to the use of the plaintiff which sum, with interest thereon, is still due and unpaid and is the property of the plaintiff.

And plaintiff avers that said money was demanded and received from the plaintiff by the defendant, as the Judge of Probate of Montgomery County, Alabama, as a franchise tax, which the defendant, as such Judge claimed to be due by the plaintiff, under an Act of the Legislature of Alabama, approved March 7th, 1907, entitled "An Act to provide for the revenue of the State, by requiring all foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax."

And plaintiff avers that it is, and was, on, to wit, the 29th day of February, 1908, and for a long time prior thereto, a foreign corporation created and organized under the laws of the State of Georgia, doing an inter-state and intra-state railroad business in the State of Alabama, in conformity with the laws of the State of Alabama, and that on, to wit, the 29th day of February, 1908, it caused its First Vice President and Secretary to make a written statement, under oath, to the defendant, as the Judge of Probate of Montgomery County, Alabama, in which said County plaintiff has a resident agent, showing the name of the plaintiff corporation, the State and County under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock, and the actual amount of capital employed in the State of Alabama, by which said statement it was shown that the actual amount of the capital stock employed by the plaintiff in the State of Alabama, was, to wit, One Million One Hundred and Three Thousand Five Hundred ($1,103,500.00) Dollars and there-
17 upon, the defendant as such Judge of Probate swore and examined one of plaintiff's officers as to the amount of the capital of the plaintiff actually employed in the State of Alabama, and, in and by such examination of such officer, it was shown, as was a fact, that the actual amount of capital employed by the plain-

tiff in the State of Alabama, for the year ending, to wit, June 30th, 1907, in operating its railroad, exclusive of the amount invested in road-beds, equipment, and other permanent property, was, to wit, One Million One Hundred and Three Thousand, Five Hundred ($1,103,500.00) Dollars, and the defendant, as such Judge of Probate so found and declared.

Plaintiff further avers that its fiscal year is, and for a long time has been June 30th of each year to June 30th of the next succeeding year, and that all of its accounts are, and have been for a long time, kept from June 30th of each year to June 30th of the next year, and that said fiscal year from June 30th, 1906, to June 30th, 1907, was plaintiff's last fiscal year prior to the 29th day of February, 1908. Plaintiff avers that the actual amount of the capital employed by it in the State of Alabama for the calendar year ending January 1, 1908, in operating its railroads, exclusive of the amount invested in its road-beds, equipment, and other permanent improvements, did not exceed said sum of, to wit, One Million, One Hundred and Three Thousand Five Hundred ($1,103,500.00) Dollars, and that the amount of the franchise tax payable under said Act, for the use of the State, was, to wit Seventeen Hundred and Fifty Eight and 75/100 ($1758.75) Dollars.

The plaintiff further avers that the defendant, as such Judge of Probate, further found that the said amount of capital, so employed by the plaintiff in the State of Alabama, did not constitute the true basis for determining the actual amount of capital employed by plaintiff in the State of Alabama, within the meaning of the said Act of the Legislature of the State of Alabama, and that the value of all the plaintiff's tangible property employed in the State of Alabama, without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama, within the meaning of said Act, and, as
18 was a fact, that upon that basis the amount of the plaintiff's capital, so employed was, to wit, Seven Million, Five Hundred and Eleven Thousand Nine Hundred and Sixty-four and 65/100 ($7,511,964.65) Dollars, and further found that the sum of to wit: Seventy five hundred and Eighty and 96/100 ($7580.96) Dollars was the amount of the franchise tax due by the plaintiff to the State of Alabama under said Act, and that the sum of, to wit: Thirty Seven Hundred and Ninety and 48/100 ($3790.48) Dollars was the amount of such tax due to the County of Montgomery, and that said sums aggregated the sum of, to wit: Eleven Thousand, Three Hundred and Seventy One and 44/100 ($11,371.44) Dollars, which said sum he, as such Judge of Probate, demanded of the plaintiff, and declined to receive of the plaintiff any smaller sum.

Plaintiff avers that it owned and operated in said business in said State, railroads of the value of many millions of dollars and a large amount of equipment, and that if not permitted to do an intra-state business in Alabama, plaintiff could not earn, with said property, the cost of operating the same, and the value of said property thereby would be greatly impaired, if not ruined, and said property would be thereby rendered almost valueless.

And plaintiff avers that under duress, because of the provisions of said Act of the Legislature providing for said tax, whereby plaintiff was, and is, upon its failure to pay said taxes within sixty days after the same become due, prohibited from doing any business in the State of Alabama, not constituting inter-state commerce, and from maintaining or demanding any action in any of the Courts of Alabama upon a contract made in said State, other than contracts based upon inter-state commerce, and because of other onerous penalties for its failure or refusal to pay said taxes, with which it was threatened, the plaintiff paid to the defendant, under protest, said sum of Eleven Thousand, Three Hundred and Seventy one and 44/100 ($11,371.44) Dollars, so demanded by the defendant, although there was not due upon said franchise tax more than the sum of, towit, Seventeen Hundred and Fifty Eight and 75/100 ($1758.75) Dollars.

And plaintiff further avers that at the time of the payment of said sum to the defendant, it notified the defendant that the amount demanded and paid was excessive, and that suit would, within
19 a reasonable time, be brought against him to recover the same, and not to pay over said sum to the authorities of the State of Alabama, or to any person or party other than plaintiff, until the rights of the plaintiff in said matter should be adjudicated. And plaintiff avers that the defendant still has possession of said money so paid to him by the plaintiff, as aforesaid.

Wherefore, this suit.

9. The plaintiff, the Central of Georgia Railway Company, a corporation, claims of the defendant, John B. Gaston, the sum of Eleven Thousand, Three Hundred and Seventy one Dollars and forty four cents ($11,371.44), due to it for money on, towit, the 29th day of February 1908, received by the defendant to the use of the plaintiff, which sum of money with the interest thereon is still due and unpaid and is the property of the plaintiff.

And plaintiff avers that said money was demanded of the plaintiff by the defendant as Judge of Probate of Montgomery County, as a franchise tax alleged to be due by the plaintiff under an Act of the Legislature of Alabama, approved March 7th, 1907 known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax."

And plaintiff further avers that on and for many years next preceding the 29th day of February 1908, it was and has been a foreign corporation, having been organized and existing as a corporation under the laws of the State of Georgia; and having been, during said period, authorized and empowered under the laws of the State of Alabama to do and doing business in the State of Alabama, as a common carrier railroad corporation, and have been and being engaged in doing both inter-state and intra-state business in the transportation of freight and passengers for hire in the State of Alabama; and that on and for many years next preceding the 29th

day of February, 1908, the plaintiff was a person, subject to a
within the jurisdiction of the State of Alabama, in the sense a
meaning of section one of the fourteenth amendment to the Cons
tution of the United States.

And plaintiff avers that during said period it had do
20 all that it, as a foreign corporation, was required by
Constitution and laws of the State of Alabama to do in ord
to authorize it to do business in the State of Alabama, and to th
end it had a known place of business in the State of Alaba
namely, in the City of and County of Montgomery, in said Sta
and an authorized agent residing therein, and had filed with
Secretary of State of Alabama a certified copy of its charter and a
an instrument in writing, under its corporate seal and signed o
cially by its proper officers, designating a known place of busin
in the State of Alabama and an authorized agent residing there
that it also paid each year, at or within the time prescribed by
laws of the State of Alabama, its annual license tax required to
paid by foreign corporations doing business in Alabama and h
received a license from the Secretary of State authorizing it to
business in the State of Alabama as a common carrier railro
corporation for many years next preceding and during the year 19

And plaintiff avers that it has during said period owned and op
ated, and still owns and operates, in said business in said State
Alabama, railroads, property and equipment of the value in
aggregate of many millions of dollars, and which said property h
been used and is being used by plaintiff in both inter-state and int
state business, and the value of its said property is dependent large
if not entirely, upon its right and authority to do an intra-state
well as an inter-state business, and that if not permitted to do
intra-state business in the State of Alabama, plaintiff could not e
with its said property the cost and expenses of operating the sa
and the value of said property would thereby be greatly impai
and would be rendered practically valueless.

Plaintiff further avers that on, towit, the 29th day of Febru
1908, under protest for the reasons hereinafter set out, the plain
made return or report to the Honorable John B. Gaston, as Ju
of Probate of Montgomery County, Alabama, under said Act of
Legislature of Alabama, approved March 7th, 1907, setting fo
that its capital stock was, and was and is a fact, Five Mill
21 Dollars ($5,000,000.00) and that it did actually employ
the State of Alabama of said capital stock, as was and i
fact, the sum of one million, one hundred three thousand five h
dred dollars ($1,103,500.00) that the said John B. Gaston, as Ju
of Probate, declined to accept the said report or return and
amount of taxes based upon the capital employed in the State of
bama as thus shown, and thereupon swore and examined, under
provisions of said Act, one of the Officials of the plaintiff compe
and from his evidence ascertained or found that the taxable va
of the plaintiff's tangible property, situate within the State of
bama, amounted to, towit, Seven Million, Five Hundred Ele

Thousand, Nine Hundred Sixty Four Dollars and Sixty Five cents ($7,511,964.65) and that such value formed and was, as construed by him, the true amount of capital actually employed in the State of Alabama, under the provisions of said Act of March 7th, 1907, and demanded of the plaintiff the amount of taxes raised thereon, towit, Eleven Thousand, Three Hundred Seventy One Dollars and forty four cents ($11,471.44) the sum of, towit, Seven Thousand, Five Hundred Eighty Dollars and Ninety Six cents ($7,580.96) was for the State, and the sum of, towit, Three Thousand, Seven Hundred Ninety Dollars and forty eight cents ($3,790.48) was for the County of Montgomery, and declined to receive and accept any less sum.

And plaintiff avers that under duress, and under legal compulsion, and on account of the extreme and onerous penalties provided in the said Act of March 7th, 1907, for failing to pay such taxes, and particularly that provision of said Act providing and stipulating, that no foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting inter-state commerce or maintain or demand any action in any of the Courts of this State upon a contract made in this State other than contracts based upon inter-state commerce, unless such corporation shall have paid such taxes within sixty days after the same become due, plaintiff paid said entire sum under protest and thereafter notified the said defendant not to pay over said sum to the State of Alabama, or to the County of Montgomery, or to any other
22 person or party other than the plaintiff, and that plaintiff would bring suit against him within a reasonable time to recover the money so paid. Which said notice and protest was in writing and a copy of which is hereinafter set out in this complaint marked Exhibit B, and made a part hereof.

And plaintiff avers that the said Act of the Legislature of Alabama, approved March 7th, 1907, and entitled as hereinabove set out is unconstitutional, void and of no effect for that:

(*a*) Said Act is violative of the Fourteenth Amendment of the Constitution of the United States in that it denies to the plaintiff and all other foreign corporations doing business in the State of Alabama, the equal protection of the laws, and takes their property without due process of law, by discriminating against the plaintiff and all other foreign corporations doing business in the State of Alabama, in favor of domestic corporations.

(*b*) Said Act is contrary to the Fourteenth Amendment to the Constitution of the United States in that it denies to plaintiff, and all other foreign corporations engaged in business in the State of Alabama, the equal protection of the laws, and takes their property without *the* due process of law by discriminating against plaintiff and all other foreign corporations, in favor of domestic corporations, for that plaintiff avers, under Section 229 of the Constitution of the State of Alabama, the Legislature of said State is directed, to provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State, which shall be in proportion to the amount of capital stock, and under Section 232

of the Constitution of the State of Alabama, the Legislature is directed to provide for the payment *of* the State of Alabama of a franchise tax by foreign corporations but such franchise tax, the said Constitution provides shall be based on the actual amount of capital employed in this State; and plaintiff avers that the only law under which any tax of this or like character is exacted of domestic corporations is contained in Section 4122 of the Code of Alabama 1895 as amended by the Act of March 5th, 1901, entitled "An Act to further amend the revenue laws of the State of Alabama" under
23 the twenty fourth subdivision of which it is provided "All corporations doing business in this State, whether organized in this State or another State or Country not otherwise specifically required to pay a license tax, shall pay annually the following privilege taxes * * * Where the paid up capital stock exceeds $1,000,000.00, $500.00" That Class "f" of the first section of the said Act of March 7th, 1907, provides:

"No foreign corporation which has paid the tax required under this Act shall be required to pay the tax imposed by subdivision twenty four of Section 4122 of the Code of 1895, as amended by the Act of the General Assembly, entitled "An Act to further amend the revenue laws of the State of Alabama, approved March 5th, 1901."

So that, plaintiff avers foreign corporations are excepted from said Code Section 4122, as amended by the Act of the Legislature of March 5th, 1901, and said Code Section, as amended, applied only to domestic corporations;

And plaintiff avers that under said Code Section 4122, domestic corporations whose capital stock exceeds $1,000,000.00 are required to pay the sum of $500.00 whereas, the plaintiff, whose capital stock exceeds $1,000,000.00 has been taxed under said Act of March 7th, 1907, and was required to pay the sum of $11,371.44 of which $7,580.96 is paid to the State and $3,790.48 is paid to the County.

And plaintiff avers that the distinction thus made by the State of Alabama between domestic corporations and foreign corporations in the matter of payment of franchise taxes is arbitrary and unjust, and denies to the plaintiff and all other foreign corporations, the equal protection of the laws and takes their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as aforesaid;

(c) Said Act of March 7th, 1907, is contrary to the Fourteenth Amendment to the Constitution of the United States, in that it denies to plaintiff and all other foreign corporations the equal protection of the laws, and takes their property without due process of law, in that plaintiff and all other foreign corporations are required to pay a franchise tax annually to a County in the State, in one half
of the amount of the franchise tax which they are required to
24 pay to the State, whereas domestic corporations are not required to pay any franchise tax, of any character, to any County in the State of Alabama.

(d) Said Act of March 7th, 1907, is unconstitutional and void and contrary to the fourteenth amendment to the Constitution of

the United States, in that plaintiff and all other foreign corporations are required to pay franchise taxes based on the actual amount of capital employed in the State, whereas domestic corporations are required to pay the same or similar character of taxes, which are assessed in proportion to the amount of capital stock of said domestic corporations, and plaintiff avers that a different and greater method is applied to plaintiff and other foreign corporations than is applied to domestic corporations, and the classification of corporations doing business in the State of Alabama into domestic corporations and foreign corporations for the purpose of imposing franchise taxes, is arbitrary, unjust and unequal and denies to the plaintiff and other foreign corporations the equal protection of the laws and takes their property without due process of law, contrary to the Fourteenth amendment to the Constitution of the United States, as aforesaid.

(e) Said Act is violative of Section 214 of the Constitution of the State of Alabama, which provides that "That the Legislature shall not have the power to levy in any one year a greater rate of taxation than 65 100 of 1% on the value of the taxable property within this State", for that, as plaintiff avers the tax imposed by the provisions in said Act is in effect and in substance a property tax, the amount of which as ascertained by the defendant, as herein above alleged, is based upon the taxable value of plaintiff's tangible property in the State of Alabama, and which amount of said tax, thus ascertained added to the ad valorem taxes on tangible and intangible property in the State of Alabama, required to be assessed under the laws of said State, now amount and did amount on the 29th day of February, 1908, and previously, to more than 65 100 of 1% on the value of the taxable property of the plaintiff in the State of Alabama;

(f) Said Act is contrary to the provisions of Section 211 of the Constitution of the State of Alabama, which provides: "All taxes levied on property in this State shall be assessed in exact proportion to the value of said property", in that the property of the plaintiff is taxed at a greater rate than is the property of the other persons and corporations who own property in the State of Alabama.

(g) Said Act is contrary to the provisions of Section 217 of the Constitution of the State of Alabama, which provides that "The property of private corporations, associations and individuals of this State shall forever be taxed at the same rate."

(h) Said Act is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, for that it denies to the plaintiff the equal protection of the laws, in that the property of the plaintiff which is located within the State of Alabama, is taxed by the State of Alabama at a higher rate than is similar property of other persons assessed under precisely the same circumstances and conditions;

(i) Said Act is contrary to paragraph three, of Section Eight, of Article one of the Constitution of the United States, in that the so called franchise tax imposed thereby, is in substance and effect a

burden upon the business of inter-state commerce, which the plaintiff conducts in the State of Alabama as aforesaid, and is a regulation or attempted regulation thereon.

(j) Said Act of March 7th, 1907, is contrary to paragraph one of Section Ten, of Article one of the Constitution of the United Sattes, which provides that no State shall pass any law impairing the obligation of contracts, in that the plaintiff had complied with all of the laws of the State of Alabama authorizing it to do business in the State;

That under section 3489 of the Code of 1896, as amended by section 8 of the Act of the Legislature of February 28th, 1903 entitled "An Act to amend Chapter 96 of the Code of 1896" it is provided that every railroad corporation operating in the State of Alabama must annually pay a license tax, based on the amount of its gross earnings in the State, sufficient to pay the expenses of the railroad commission authorized by law, and further that upon the production of the Treasurer's receipt for such taxes, and satisfactory evidence that the person or corporation paying the same is prepared
26 to transport freight and passengers with reasonable safety over its railroad, the Auditor shall issue to such person or corporation a license to operate such railroad for one year, and that any person or corporation operating a railroad in this State without such license shall forfeit $100.00 for each day so engaged, one half for the person suing for the same, and the other half for the State, and plaintiff avers, that it duly paid the license tax under said section of the Code and received a license to operate its railroad for one year, which license was in force at the time of the passage of said Act of March 7th, 1907, and was also in force at the time the so called franchise tax was assessed against the plaintiff by the defendant under the said Act of March 7th, 1907;

That under the Act of the Legislature of Alabama approved March 4th, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations, organized under and by authority of the law of any other State or government than the State of Alabama and to fix a penalty for the violation thereof", it is provided that each foreign corporation shall be required to procure from the Secretary of State a license authorizing the doing of business in the State of Alabama by said corporation, which said license shall be prepared by and countersigned by the Auditor of the State of Alabama and shall be delivered by said Auditor to the Secretary of State and for such license for said corporation it shall pay to the Secretary of State a fee of $5.00 for the six months from July 1st, 1907, to January 1st, 1908, or any part of said time, and thereafter $10.00 per annum for any part of a year, and plaintiff duly paid the said $5.00 license fee exacted by said Act for the six months from July 1st, 1907 to January 1st, 1908, and duly paid the $10.00 for the year beginning January 1st, 1908, and the license required by said Act was duly delivered by the Auditor to the Secretary of State in accordance with the provisions of said Act.

That the Act of the Legislature of the State of Alabama approved

March 7th, 1907, entitled "An Act to amend Sections 1321 and 1322 of the Code of 1896" provides that no corporation created by the laws of any other State shall engage in or transact any business in this State without first having paid into the treasury for the use of the State, certain charter fees, which said fees plaintiff has duly paid;

That plaintiff has also paid the franchise tax or intangible property tax imposed by the Act of the Legislature of Alabama of March 4th, 1907, entitled "An Act to make subject to taxation, and tax the franchises or intangible property and assets of any person, association, company or corporation engaged as a common carrier in this State, and has also paid all other taxes and licenses lawfully due to the State of Alabama.

And plaintiff avers that by virtue of the above recited acts it has in effect a valid and subsisting contract with the State of Alabama, whereby it was and is authorized and empowered to conduct its business in the State of Alabama, both domestic and inter-state, for which it has paid to the State of Alabama a valuable consideration and in reliance upon the acts of the Legislature and the Code Sections herein in paragraph "j" set forth, has made many contracts and created many obligations; wherefore, plaintiff avers that the said so-called franchise Act of March 7th, 1907, impairs the obligations of said contracts between the State of Alabama and the plaintiff, in that it attempts to impose upon the plaintiff a tax for the privilege of doing precisely the same business which it is already authorized to do under and by virtue of the Statute of the State of Alabama, and for which it has and had paid a valuable consideration; wherefore, plaintiff avers that said Act of March 7th, 1907, is unconstitutional and void.

10. The plaintiff claims of the defendant the sum of Eleven Thousand, Three Hundred and Seventy One and 44 100 ($11,371.44) Dollars, due to it for money on, towit, the 29th day of February 1908, received by the defendant to the use of the plaintiff under the following state of facts:

The plaintiff was, on towit, January 1st, 1908 and for several years, continuously, prior thereto, and on, towit, February 29th, 1908, a foreign corporation, engaged in the business of operating a steam railroad, for hire, in Alabama, having been and being during the times above mentioned, duly and legally incorporated under the laws of Georgia, with the power and capacity to build and
28 operate steam railroads for hire in Georgia and Alabama and elsewhere. Plaintiff prior to February 29th, 1908, duly qualified under the laws of Alabama and complied with the requirements of the said laws of said State, by naming an agent in Alabama, filing a certified copy of its articles of incorporation, and paying the admission fee, and received its receipt and acknowledgment therefor, and was, prior to said date, authorized to do business, as a railroad, in Alabama.

Plaintiff on, to-wit, June 1st, 1907, and for many years prior thereto, annually, on said date in June, made return of its gross earnings, as a railroad in Alabama, in accordance with the laws of

Alabama, as set forth in Section 3489 of the Code of 1896, and on, to-wit; June 1st, 1907, paid to the State Treasurer of Alabama the tax assessed by the Auditor under the provisions of the foregoing Section of the Code, and received from the Auditor a license to operate its railroad in Alabama from June 1st, 1907 to May 31st, 1908;

That on, to-wit, July 1st, 1907, plaintiff paid to the Secretary of State of the State of Alabama the license fee required by the Act of the Legislature of Alabama, approved March 4th, 1907, entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations or corporations organized under or by virtue of the laws of any other State or government than the State of Alabama, and to fix a punishment of a violation thereof" and received from the Secretary of State of the State of Alabama a license to operate its railroad in Alabama from July 1st, 1907 to January 1st, 1908.

That on, to-wit, January 1st, 1908, it again paid to the Secretary of State of the State of Alabama, the license fee required by said Act herein next above set out, and received from the Secretary of State of the State of Alabama, a license authorizing the plaintiff to operate its railroad and transact its business of railroading in Alabama from January 1st, 1908, to December 31st, 1908;

That the Legislature of Alabama, by an Act approved March 7th, 1907, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual
29 franchise tax" provided, in substance, that every foreign corporation authorized to do business in this State, under the laws of the State of Alabama, except strictly benevolent, educational, or religious corporations, should pay annually to the Judge of Probate of the County in which it has a resident agent, a franchise tax for the use of the State of Alabama, based upon the actual amount of capital employed in Alabama, in the amount of Twenty Five ($25.00) Dollars on the first one hundred ($100.00) Dollars of the actual amount of capital employed in Alabama, five per cent upon the next Nine Hundred ($900.00) Dollars of actual amount of capital employed in Alabama, and one tenth of one per cent upon all such remaining actual amount of capital employed in said State.

Said Act provided that the foreign corporation subject to the tax, should make a written statement to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in Alabama, the total amount of its capital stock, the actual amount of capital employed in this State, if it is a corporation, at the time of the statement, authorized to do business in this State.

Said Act further provided that the Judge of Probate should have power to summon before him any of the officers of the corporation, or any other witness, in order to satisfy himself as to the amount of the capital the corporation actually employed in Alabama, and the Judge of Probate was further authorized, and it was made his

duty, to demand payment of the tax upon the amount of capital which he finds is actually employed in the State;

Said Act further provided that no foreign corporation required to pay a tax under the act should do any business in the State of Alabama not constituting inter-state commerce, or maintain or demand any action in any of the Courts of Alabama upon a contract made in Alabama, other than contracts bases upon inter-state commerce, unless such corporation shall have paid said tax within sixty (60) days after the same became due;

The second section of said act provided, in substance, that in addition to the amount required to be paid to the State such
30 foreign corporation should pay to the County, for the use of such County, an amount equal to one half of the amount paid by it to the State.

It is further provided by the laws of Alabama that any person who engages in, or carries on any business for which a license is required, without taking out such license, is guilty of a criminal offense, and upon conviction, must be fined three times the amount of the license.

Plaintiff has for several years prior hereto, had its principal place of business in Alabama, and a resident agent at Montgomery, in Montgomery County, Alabama.

That, on, to-wit, the 17th day of January 1908, one William M. Blakey, as the Tax Commissioner of Montgomery County for said State demanded of the plaintiff that it pay to the Probate Judge the tax provided by the Act hereinbefore set out, approved March 7th, 1907.

Plaintiff avers that its capital stock constitutes and is Five Million ($5,000,000.00) Dollars, that it operates its railroad in the States of Georgia, Alabama, Tennessee and Florida; that of said capital stock of Five Million ($5,000,000.00) Dollars there is employed in the State of Alabama the sum of One Million One Hundred and Three Thousand, Five Hundred ($1,103,500.00) Dollars; that plaintiff's annual operating expenses in the State of Alabama are, to-wit, Two Million, Three Hundred and Eighty Seven Thousand Four Hundred and Six ($2,387,406.00) Dollars; that the assessed value of plaintiff's tangible property in the State of Alabama for taxation is, towit, Seven Million, Five Hundred and Eleven Thousand Nine Hundred and Sixty Four and 65/100 ($7,511,964.65) Dollars; that plaintiff owns and operates in the State of Alabama, towit, six hundred (600) miles of railroad, and that a very large portion of its business is domestic commerce and it is absolutely necessary for plaintiff to have the right to maintain and demand actions in the Courts of Alabama upon the large number of contracts made in Alabama other than contracts based upon interstate commerce;

That on, towit, the 29th day of February 1908, under protest plaintiff made return to the Honorable John B. Gaston Judge
31 of Probate of Montgomery County, Alabama, under said Act, approved March 7th, 1907, setting forth that its capital stock

was Five Million ($5,000,000.00) Dollars and that it had actually employed in the State of Alabama, of said capital stock, the sum of One Million One Hundred and Three Thousand, Five Hundred ($1,103,500.00) Dollars; that based upon said amount, the tax, under said act, would be seventeen hundred and fifty eight and 75/100 ($1758.75) Dollars, being eleven Hundred and seventy two and 50/100 ($1172.50) Dollars for the State and Five Hundred and eighty six and 25/100 ($585.25) dollars for the County.

That the said John B. Gaston, Judge of Probate, declined to accept the tax based upon the amount of one million, one hundred and three thousand, Five Hundred ($1,103,500.00) Dollars, as aforesaid, and demanded the tax based upon the taxed value of the tangible property owned by the plaintiff in the State of Alabama, holding and finding that the amount of capital actually employed in Alabama, by plaintiff, was the taxable value of its tangible property, amounting to seven million, five hundred and eleven thousand nine hundred and sixty-four and 65/100 ($7,511,964.65) Dollars, which tax amounted to Seventy five hundred and eighty and 96/100 Dollars for the State and Thirty seven hundred and ninety and 48/100 ($3790.48) Dollars for the County, being a total of Eleven Thousand Three Hundred and Seventy One and 44/100 ($11,371.44) Dollars for both the State and County;

That unless the plaintiff paid said sum, it would be practically out-lawed in Alabama, it would not be permitted to make any contracts for domestic business, and not be permitted to do any business in the State of Alabama, except inter-state commerce, was threatened with criminal prosecution, the result of which would be to practically confiscate the property of plaintiff in the State of Alabama, and deprive plaintiff of a large part of its property;

That under duress, the fear of prosecution, and the fear of the result that would follow from failing to comply with the terms of said Act, and under legal compulsion, plaintiff paid on, towit, the 29th day of February 1908, to the said John B. Gaston
32 Judge of Probate of Montgomery County, Alabama, the said sum of Eleven Thousand Three Hundred and Seventy one and 44/100 ($11,371.44) Dollars, which payment was made with notice to defendant not to pay over said money to the Treasurer of the State, or the Treasurer of Montgomery County, or to anyone, except plaintiff, and that suit would be brought to test the validity of said law under which said assessment had been made and demanded and to recover back said money as a whole, and separately as to the amount paid for the use of the State and the amount paid for the use of the County.

Plaintiff avers that there are railroads in the State of Alabama operated by corporations incorporated under the laws of the State of Alabama, and are, therefore domestic corporations, but said domestic corporations are engaged in the same character of business as is plaintiff, and in competition with plaintiff; that said domestic corporations are not required by said Act of March 7th, 1907, to pay the tax which was demanded of plaintiff.

Plaintiff avers that said Act of March 7th, 1907, is invalid and violative of the Fourteenth Amendment of the Constitution of the United States, and of the Constitution of the State of Alabama, as a whole, that section two of said Act is invalid and violative of the Constitution of the State of Alabama, and plaintiff avers that said tax above required to be paid by and to the said John B. Gaston, Judge of Probate, Montgomery, Alabama, was illegally demanded and received from plaintiff:

Wherefore, it sues.

LAWTON & CUNNINGHAM,
STEINER, CRUM & WEIL,
Attorneys for Plaintiff.

The plaintiff in the above entitled cause being a non-resident of the State of Alabama, we hereby acknowledge ourselves as security for the costs of Court in said suit.

STEINER, CRUM & WEIL.

Exhibit "B" to Counts 6 and 7 and 9, Separately and Severally, in the Foregoing Complaint.

MONTGOMERY, ALA., *February* 28, 1908.

To the Hon. John B. Gaston, Judge of Probate, Montgomery County, Montgomery, Alabama.

33 SIR: The Central of Georgia Railway Company having paid to you, under protest, the sum of Eleven Thousand Three Hundred and Seventy one and 44/100 ($11,371.44) Dollars, as franchise tax imposed upon the said Company, as a foreign corporation, under an Act of the Legislature of Alabama, known as House Bill 611, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State, under the laws of the State of Alabama, to pay an annual franchise tax "Approved March 7th, 1907, which said Act the said Central of Georgia Railway Company respectfully insists is unconstitutional and void as a whole, and if not as a whole, that the second section thereof is unconstitutional and void, and that said Act is incapable of enforcement either in whole or in part, and the amount assessed by you is erroneous and excessive under the terms of said Act, and said payment has been made to you as aforesaid under protest and duress, and solely to avoid the penalties which said Company would incur or suffer under said Act by failure to make said payment, if said Act be held to be valid: now, therefore;

You are hereby notified and warned not to pay over the said money, or any part thereof to or into the Treasury of either the State of Alabama, or the County of Montgomery, or to any other person or persons, authorized, or claiming to be authorized, to receive said money or any part thereof, from your hands.

You will further take due notice that the Central of Georgia Rail-

way Company proposes to sue you as the holder of said money recover the same.

Having received this notice, you will govern yourself accordingly

Witness our hands, this the 28th day of February 1908.

CENTRAL OF GEORGIA RAILWAY COMPANY,
By LAWTON & CUNNINGHAM AND STEINER, CRUM & WEIL,
Their Attorneys.

Filed in office March 28th, 1908.

H. N. HUGHES, *Clerk*

Received in office Mar. 30, 1908.

HORACE HOOD, *Sheriff*

Executed by serving a copy of the within on John
34 Gaston this March 30th, 1908.

HORACE HOOD, *Sheriff*,
Per A. J. TAYLOR, *D. S.*

In the City Court of Montgomery, Alabama.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plaintiff,
vs.
JOHN B. GASTON, Defendant.

Demurrer to Complaint.

Comes the defendant in the above styled cause, and demurs to complaint filed in said cause, and to each count thereof, separat and severally, and for grounds of demurrer thereto, assigns the lowing:

1. Because it appears from said complaint that the tax complain of, and for the recovery of which this suit is brought, was lega and constitutionally levied, assessed and collected.

2. Because it appears from said complaint, that the Act of Legislature, imposing said tax complained of, is not violative of provision of the Constitution of the State of Alabama or of Constitution of the United States.

3. Because it appears from said complaint, that the Act of Legislature, imposing said tax complained of, in so far as it impo or levies said tax, is not violative of any provision of the Constitu of the State of Alabama or of the Constitution of the United Sta

And the defendant demurs to the first count of said complaint for grounds thereto, assigns the following:

1. Because said count does not allege the special facts, or facts, creating any liability of defendant to plaintiff.

35 And defendant demurs to the second count of the co plaint and for grounds of demurrer assigns the following

1. Because it appears from said Count that said section 2 of said Act of the Legislature, under which said tax complained of was levied and demanded, is not violative of Section 45, Article IV of the Constitution of the State of Alabama, or any other provision of said Constitution.

2. Because it appears from said Count, that the subject matter of said second section of said Act of the Legislature, is sufficiently expressed in the title of said Act.

And defendant demurs to the third count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count, that the section numbered two of said Act of the Legislature under which said tax complained of was levied and demanded, is not violative of Sections 104, 105 and 106 of the Constitution of the State of Alabama, or either of said sections.

2. Because it appears from said count that said Act of the Legislature, and the second section thereof, is a general and not a local law.

And defendant demurs to the fourth count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count that said Act of the Legislature, under which said tax complained of was levied and collected, is not violative of the Constitution of the State of Alabama.

2. Because said count fails to aver or show wherein said Act of the Legislature is violative of the Constitution of the State of Alabama.

And defendant demurs to the fifth count of said complaint and for grounds of demurrer assigns the following:

36 1. Because it appears from said count that said Act of the Legislature, under which said tax complained of was levied and collected, is not violative of the Fourteenth Amendment to the Constitution of the United States, and does not deprive plaintiff of its property without due process of law, or deny to plaintiff the equal protection of the law.

And defendant demurs to the sixth count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count that the subject matter of said Section 2 of said Act of the Legislature under which the tax complained of was levied and collected, is sufficiently expressed in the title of said Act, and that it is not, therefore, violative of section 45 of the Constitution of the State of Alabama.

2. Because it appears from said count that the Legislature of Alabama had authority and power to impose said tax for county purposes.

And Defendant demurs to the seventh count of said complaint and for grounds of demurrer assigns the following:

1. Because it appears from said count that the Act of the Legislature, under which the tax complained of in said count was levied and collected, is not in violation of the Fourteenth Amendment to the Constitution of the United States, or any other provision of said

Constitution, and does not deny the plaintiff the equal protection o
the law.

2. Because it appears from said count, that said Act of the Legis
lature is not in violation of Sections 211, 214, 215 and 217 of th
Constitution of the State of Alabama, or either of said sections, o
any other provision of said Constitution.

And defendant demurs to the eighth count of said complaint an
for grounds of demurrer assigns the following:

1. Because it appears from said count that the tax complaine
of in said count, was legally and constitutionally levie
37 assessed and collected.

2. Because it appears from said count, and the act of th
Legislature referred to therein, that the value of all the tangibl
property of the plaintiff in the State of Alabama, employed in th
transaction of its business in said State, is the actual amount of cap
tal employed by plaintiff in the State.

3. Because said count fails to show that the value of all the ta
gible property of plaintiff in the State of Alabama employed by
in the transaction of its business in the State was not less tha
$7,511,964.65.

4. Because said count shows that the value of all the tangibl
property of plaintiff in the State of Alabama, employed by it in th
transaction of its business in said State, was at least $7,511,964.6

5. Because said count shows that the actual amount of capit
employed by plaintiff in the State was at least $7,511,964.65.

And defendant demurs to the ninth count of the complaint an
for grounds of demurrer assigns the following:

1. Because it appears from said count that said Act of the Leg
lature under which the tax complained of in said count was levi
and collected, is not violative of the Fourteenth Amendment
the Constitution of the United States, or any other provision of sa
Constitution, for any of the reasons set forth in said count and do
not unjustly discriminate against plaintiff and does not deny
plaintiff the equal protection of the law, and does not take plaintif
property without due process of law.

2. Because it appears from said count and said Act of the Leg
lature, under which said tax complained of in said count was levi
and collected, is not violative of Sections 214, 211 and 217 of t
Constitution of the State of Alabama, or either of said Sections,
any other provision of said Constitution, and is not violative of sa
Constitution for any of the reasons set forth in said cou
38 3. Because it appears from said count, that said tax co
plained of is not a tax on the property of plaintiff.

4. Because it appears from said count that said tax is not in st
stance or effect a burden upon the business of inter-state commer
nor a regulation or attempted regulation of inter-state commer
and is not violative of Section 8 of Article 1 of the Constitution
the United States.

5. Because it appears from said count, that said Act of the Leg
lature, under which the tax complained of was levied and collect
does not impair the obligation of the alleged contract between t

State of Alabama and plaintiff, or of any other contract, and is not violative of section 10 of Article 1 of the Constitution of the United States.

6. Because it appears from said count of the complaint that the facts alleged therein do not constitute any contract between the State of Alabama and plaintiff, that would be, or could be, impaired by the levy and collection of the tax complained of.

7. Because it appears from said count of the complaint that the Act of the Legislature, under which the tax complained of in said count was levied and collected, in so far as the same levies or imposes said tax, does not impair the obligation of the alleged contract between the State of Alabama and plaintiff, set up in said count.

And the defendant demurs to the tenth count of said complaint, and for grounds of demurrer assigns the following:

1. Because it appears from said count, that the tax complained of in said count, was legally and constitutionally levied, assessed and collected.

2. Because it appears from said count, that the Act of the Legislature, under which the tax complained of was levied and collected, is not violative of the Fourteenth Amendment to the Constitution of the United States, or any other provision of said Constitution, and is not violative of any provision of the Constitution of the State of Alabama.

ALEX. M. GARBER,
Attorney General of the State of Alabama.

39 SAM'L D. WEAKLEY,
H. C. SELHEIMER,
Special Counsel.

Filed in office April 27th, 1908.

H. N. HUGHES, *Clerk.*

THURSDAY, *July 9th, A. D.* 1908.

Court met pursuant to adjournment.
Present the Hon. A. D. Sayre, Judge Presiding.

1068.

CENTRAL OF GEORGIA RAILWAY COMPANY, a Corporation Organized and Existing under the Laws of the State of Georgia,

vs.

JOHN B. GASTON.

Assumpsit.

This the 9th day of July 1908, came the parties by their attorneys, and the defendant's demurrer to the complaint and each count thereof, except count number one of the complaint, being argued by counsel and understood by the Court and being considered by the Court, it is considered and ordered by the Court, and it is the

judgment of the Court, that the said demurrer to the complaint a
each count thereof, except as to count number one of the complai
be and the same is hereby sustained.

THE STATE OF ALABAMA,
Montgomery County:

Be it remembered that at a term of the City Court of Montgome
begun and holden for said County at the Court House in the C
of Montgomery, State and County aforesaid, on the first Monday
October, in the year of Our Lord One Thousand Nine Hundred a
Eight, it being the 5th day of said month, Present the Ho
40 orable A. D. Sayre, Judge Presiding, the following proce
ings were had and the following judgment were rendere
to-wit:

FRIDAY, *October 23rd, A. D.* 1908.

Court met pursuant to adjournment.
Present the Hon. A. D. Sayre, Judge Presiding.

4038.

CENTRAL OF GEORGIA RAILWAY COMPANY, a Corporation Organi
and Existing under the Laws of the State of Georgia.
vs.
JOHN B. GASTON.

Assumpsit.

This day came the parties by their attorneys, and by leave of
Court the defendant withdraws his demurrer to count numbe
one (1) of the complaint. And by leave of the Court the plain
withdraws count numbered one (1) of the complaint, and the pla
tiff declining to amend its complaint after ruling on demur
thereto, it is considered and ordered by the Court and it is the ju
ment of the Court that judgment be and the same is hereby rende
in favor of the defendant.

It is therefore considered, ordered and adjudged by the Court t
the defendant go *quam* and recover of the plaintiff the costs in
behalf expended, for all of which let execution issue.

41 CENTRAL OF GEORGIA RAILWAY CO.
vs.
JOHN B. GASTON.

We hereby acknowledge ourselves as security for costs of ap
of above case to the Supreme Court of Alabama.

CENTRAL OF GEORGIA RAILWAY CO. [L. S.
By R. E. STEINER, *Its Agent.*
R. E. STEINER. [L. S.
B. P. CRUM. [L. S.

Approved: This 25th day of Oct. 1908.
H. N. HUGHES, *Clerk.*
Filed in office October 25th, 1908.
H. N. HUGHES, *Clerk.*

THE STATE OF ALABAMA,
Montgomery County:

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Alexander M. Garber Attorney of Record of John B. Gaston, to appear at the next term of the Supreme Court of said State, then and there to defend an appeal which Central of Georgia Railway Company, has this day sued out, returnable to said court to reverse a judgment which John B. Gaston, at the October Term 1908 of the City Court of Montgomery, recovered against Central of Georgia Railway Company, and make immediate return of this Writ &c.

Witness, Henry N. Hughes, Clerk of said City Court this 25th day of October A. D. 1908.

H. N. HUGHES,
Clerk of the City Court of Montgomery.

Received in office Dec. 1st, 1908.

HORACE HOOD, *Sheriff*

Executed by serving a copy of the within notice on A. M. Garber, Atty. of Record for defendant. This Dec. 1st, 1908.

42

HORACE HOOD, *Sheriff*
Per W. A. HAYNES, *D. S.*

THE STATE OF ALABAMA,
Montgomery County:

I, H. N. Hughes, Clerk of the City Court of Montgomery, in and for said State and County, do hereby certify that the foregoing pages numbered from one to forty inclusive, contain a full, true and complete transcript of the record and proceedings of said Court, in a certain cause lately therein pending wherein the Central of Georgia Railway Company, a corporation, was plaintiff and John B. Gaston was defendant, as fully and completely as the same appears of record in said Court.

And I further certify that the said plaintiff did on the 25th day of October 1908, pray for and obtain an appeal from the judgment of said Court to the Supreme Court of Alabama to reverse said judgment of said Court, upon entering into bond for the costs of said appeal with R. E. Steiner and B. P. Crum as sureties thereon, as required by law, which said bond has been approved by me.

Witness my hand this 1st day of December 1908.

H. N. HUGHES,
Clerk of the City Court of Montgomery.

43 In the Supreme Court of Alabama.

CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant,
vs.
JOHN B. GASTON, Appellee.

Now comes the Central of Georgia Railway Company, a co
tion, the Appellant in the above entitled cause, and shows
the Court that manifest error, to its prejudice, hath interven
the proceedings and trial of said cause in the lower Court, a
now herein assigns, separately and severally the following:

1. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the com
filed in said cause.

2. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the s
count of the complaint filed in said cause.

3. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the
count of the complaint filed in said cause.

4. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the f
count of the complaint filed in said cause.

5. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the
count of the complaint filed in said cause.

6. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, to the
count of the complaint filed in said cause.

7. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below to the se
count of the complaint filed in said cause.

8. The City Court of Montgomery erred in sustaining th
murrer of the Appellee, defendant in the Court below, to the ei
count of the complaint filed in said cause.

9. The City Court of Montgomery erred in sustaining th
murrer of Appellee, defendant in the Court below, t
44 ninth count of the complaint filed in said cause.

10. The City Court of Montgomery erred in sustai
the demurrer of Appellee, defendant in the Court below, to the
count of the complaint filed in said cause.

STEINER, CRUM & WEIL,
Attorneys for Appella

45 Minutes Supreme Court of Alabama, November Term, 1908.

FRIDAY, *December 18th*, 1908.

The Court met pursuant to adjournment.

Present:

Hon. John K. Tyson, Chief Justice.
Hon. J. R. Dowdell, Associate Justice.
Hon. Jno. C. Anderson, Associate Justice.
Hon. T. C. McClellan, Associate Justice.

3 Div. 803.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
JOHN B. GASTON.

Appeal from Montgomery City Court.

Come the parties by attorneys, and argue and submit this cause for decision.

Minutes Supreme Court of Alabama, November Term, 1908.

THURSDAY, *February 11th*, 1909.

The Court met pursuant to adjournment.
Present: All the Justices.

3 Div. 803.

CENTRAL OF GEORGIA RAILWAY COMPANY
vs.
JOHN B. GASTON.

Appeal from Montgomery City Court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all
46 things affirmed. It is also considered that the Appellant and R. E. Steiner and B. P. Crum, sureties on the appeal bond, pay the costs of appeal of this Court and of the City Court.

47 The State of Alabama—Judicial Department.

The Supreme Court of Alabama, November Term, 1908-9.

3 Div. 803.

CENTRAL OF GEORGIA RAILWAY CO.
v.
JOHN B. GASTON.

Appeal from Montgomery City Court.

SIMPSON, *J.*:

The judgment of the court is affirmed, on the authority of the case of *Southern Railway Co. v. Samuel E. Greene*, in MS. These cases were argued, submitted, and considered, together, and the points raised by the pleadings in each case are, for convenience, treated of and embodied in the one opinion.

Affirmed.

Dowdell, Denson, McClellan, and Mayfield, JJ., concur.

Anderson, J., dissents.

48 The State of Alabama—Judicial Department.

The Supreme Court of Alabama, November Term, 1908-9.

6 Div. 692.

SOUTHERN RAILWAY COMPANY
v.
SAMUEL E. GREENE.

Appeal from Birmingham City Court.

SIMPSON, *J.*:

This suit was brought by the appellant, against the appellee as Probate Judge of Jefferson County, to recover $22,458.36 which had been paid to said probate judge under protest, on account of the franchise tax required by Act of 1907, p. 418, sections 2364-2367 of the Code of 1907.

The complaint alleges that the plaintiff is a corporation, organized under the laws of Virginia, specially authorized by said laws to acquire railroad properties in other states, by either purchase or consolidation, and to use the same in the business of transporting passengers and freight, as a common carrier; that it commenced business July 1st, 1894, and has continued in business ever since, having acquired various lines of railway in Virginia, North Carolina, Tennessee, Georgia, and other States; that it is and has been conducting both an interstate and intra-state business; that on July 16th

1894, it filed in the office of the Secretary of State of Alabama a copy of its charter and, at the same time, designated its principal place of business in said State, and an agent on whom process
49 could be served, and paid to the Treasurer of the State of Alabama $250.00, being a full payment of the fee required by the provisions of an act to require all corporations to pay a fee or license, for the use of the State, before commencing business in this State, approved February 18th, 1893, and at once entered upon the business in said State for which it was chartered; also that it has paid the tax on franchise, or intangible property, required of all corporations by the Act of March 4th, 1907, section 2365 of Code of 1907; that between the time of commencing business and the year 1899, it purchased and acquired various lines of railroad in said State, connected with, and continuous of the other lines owned by it (which are described in the complaint); that it paid large sums of money for said lines, in reliance upon the then laws of Alabama, and has, since, continuously operated said lines, transacting a large amount of business, interstate and intra-state, and has expended large sums in maintaining the same and in improvements and betterments; that it has, from year to year, paid all property taxes and license taxes required by law, inclnding the license fee of ten dollars, by the Act of March 4th, 1907, required of foreign corporations only; that the tax required by the Act of March 7th, 1907, now complained of, is exacted of foreign corporations only; that the lines operated and owned by the plaintiff, in Alabama, were made the basis, in ascertaining the amount of said franchise tax due by plaintiff.

The complaint was demurred to, the demurrers were sustained, and judgment was rendered for the defendant.

In order to determine the issues involved in this case, it is necessary, first, to ascertain the nature of the tax complained of, and, specially, whether or not it is a tax on property—counsel, in argument, placing some emphasis on this point.

A franchise is a special privilege conferred by the government on individuals.—*Bank of Augusta v. Earle*, 13 Pet. 519; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. 38.

In an early case, the Supreme Court of the United States said: "A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone. * * * It is its character of property only which imparts to it value, and alone
50 authorizes in individuals a right of action for invasion or disturbance of its enjoyment."—*West Bridge Co. v. Dix, 6 Howard*, 793, 797–8.

In another case, before the same court, in which it was held that a statute exempting all the property of a railroad corporation from taxation included the franchise, it was said: "Nothing is better settled than that the franchise of a private corporation—which, in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken, for public use even, without compensation. It is true it is not the same sort of property as the rolling stock, roadbed, and depot

grounds, but it is equally, with them, covered by the general ter
the property of the company."—*Wittington R. R. v. Reid, Shiff.*
Wall. 264, 268.

The case just cited is quoted and reaffirmed in *Gulf & Ship Isl*
R. Co. v. Hewes, 183 U. S. 67, 77.

The case of "*The State v. Stonewall Ins. Co.*" (89 Ala. 335) h
merely that a tax on the "capital stock" of a corporation was a
on property, and the court said: "Owing to the difficulty of dis
guishing between the capital and the property in which it is inves
tests for determining whether a tax is on the property, or the fr
chises, may be regarded generally uncertain and unsatisfact
* * * The usual and most certain test is, whether the tax is u
the capital stock *eo nomine*, without regard to its value or at
assessed valuation, in whatever it may be invested; if the former, i
a franchise tax; if the latter, a tax upon property" (p. 338).

In the case of *Phoenix Assurance Co. v. Fire Department of M*
gomery (117 Ala. 631), the act in question required all insura
companies, domestic and foreign, to pay two hundred dollars bef
taking any premium against fire, etc., and this court considere
a "privilege or occupation tax", the court saying: "Moreover it is
settled that limitations have relation to the taxation of property o
—property which must be assessed according to its value—and
to other subjects of taxation, such as privileges and occu
51 tions" (p. 646). Treating it as a privilege tax, it was uph
the court saying: "The rule of uniformity does not requ
that all subjects be taxed or not taxed alike; the requirement is c
plied with when the tax is levied equally and uniformly on all s
jects of the same class and kind" (p. 653).

In the case of *Phoenix Carpet Co. v. State* (118 Ala. 143), the
complained of was distinctly a privilege tax, levied only on those
porations not otherwise specifically required to pay a license
whether domestic or foreign. The validity of the tax was questio
by a domestic corporation, on the ground that it violated the
formity provisions of our Constitutions—1st, because such privil
tax was not required of individuals doing a like business; and, 2
because it was not required of all corporations.

The tax was held to be valid, the court saying, it "has the pro
ties and quality of a franchise tax—it is measured or graduated
the amount of the paid-up capital stock of the corporation, and
distinguishes it from a tax on property" (p. 151).

It will be observed that these cases refer to privilege or occupa
taxes, which, as stated, are "annexed to the franchises, as a roy
for the grant;" and it is stated that "the tax may be imposed on
creation of the corporation, but if the charter or grant of incorp
tion does not expressly exempt it from taxation, a tax on the f
chise may be subsequently imposed at the will of the legislatu
provided the equality and uniformity as observed which "consis
the imposition of the like tax upon all who engage in the avocat
or who may exercise the privilege taxed; and if it be a franchise
upon all corporations belonging to the class upon which it is impos
(pp. 151-2).

It was said in argument that the tax on a corporate franchise is a tax on the right to be a corporation, but that is not correct, for the right to be a corporation is a right or franchise that belongs to the individuals who compose the corporation, and not to the corporation itself. The franchises of the corporation are the rights to engage in and carry on the business for which it was chartered.—*Feitsam, Assignee v. Hay*, 13 N. E. 501, 502; *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083; *Memphis & L. R. Co. v.*
52 *Commissioners*, 112 U. S. 609, 619.

There are so many conflicting authorities, that it is a matter of considerable difficulty to know just where to draw the line between a franchise as an asset of the corporation, and a franchise tax as synonymous with a license or privilege tax.

In a case in New York, where a tax was imposed on "the corporate franchise or business of all corporations, and it was sought to be imposed upon a Pennsylvania corporation which had no property in New York, but had terminal facilities, such as wharves, piers, and docks, for receiving passengers and freight to be carried to its railroad in New Jersey, and an office for issuing tickets, etc., the Court of Appeals held that the law was not violative of the interstate commerce law, because the tax was not on the property, but on the "corporate franchise or business, by the express language of the enactment", and said: "The tax when imposed on a domestic corporation, is a tax on its corporate franchise; when imposed on a foreign corporation is a tax on its business, a distinction based on the fact that corporate franchises are only taxable within the jurisdiction which creates them and where alone they can be said to have a situs."—*People ex rel. Penna. R. Co. v. Wemple*, 19 L. R. A. 694, 695-7.

In another case in which it was held that a tax on the "capital stock" of a corporation did not mean the shares of stock in the hands of the shareholders, but the capital owned by the corporation, the court said: "The franchise of the company which may be deemed its business opportunity and capacity, is the property of the corporation;" also, "That the property of every company may consist of three separate and distinct things which are its capital stock, its surplus, its franchises.—*People ex rel. U. T. Co. v. Coleman et al.*, 126 N. Y. 433, 437, 438.

In another case, in which the Supreme Court of the United States affirmed the New York Court of Appeals in holding that this franchise tax was not a tax on the capital stock, and not invalid, in so far as bonds of the United States constituted a part of that stock, the court holds that the term, "corporate franchise or business," means "the right or privilege given by the State to two or more persons of being a corporation, that is of doing business in a corporate
53 capacity, and not the privilege or franchise which, when incorporated, the company may exercise; "also that the tax is not a tax on the capital stock or property of the company, but upon its corporate franchise."—*Home Ins. Co. v. New York*, 134 U. S. 594, 599, 606.

It will be observed that the question at issue in these cases was not whether the corporate franchise is property, but whether it is iden-

tical with the tangible property which it represents. So really these decisions do not throw much light on the question as to whether the franchise of a corporation is, in and of itself, property.

In a late case, in which the Supreme Court of the United States held that certain provisions of the charter of a corporation did not prevent the State from levying a franchise tax, the court says: "The tax in question is a property tax, and the effect of the decision is to uphold a valuation of the whole property as a going concern.—*Honolulu T. Co. v. Wilder*, 211 U. S. 137, 142.

Joyce, in his recent work on Franchises, draws the distinction between a franchise to *be*, and a franchise to *do*; but holds that both go with it wherever it goes as a corporation. He also speaks of them as "intangible properties."—Joyce on Franchises, Sec. 39. He also speaks of the various names given in different States to charges imposed upon the franchise right of corporations to carry on their business within the State, and notes the conflicts; but states that, by whatever name called, the State has the power to impose conditions on foreign corporations, within certain limits, for doing business in the State.—Joyce on Franchises, Sec. 356.

Mr. Gray, in his work on Limitations of Taxing Power, states that the franchise *to be*, and the franchise *to do*, may be taxed either as property or "by way of privilege, excise, or license taxation" (p. 34, Sec. 47*a*). He seems to think that the law is in such a state of chaos, that, in many cases, it may be decided either way (pp. 38-9). He suggests a solution, to the effect that, when used as a noun, the word *franchise* indicates property, but when used as an adjective in the expression, "franchise tax", it indicates a privilege tax, and he says: "Where a tax is imposed in the shape of an annual charge or excise upon the right to *continued* corporate existence that also is not a property tax, but a privilege or license tax (pp. 40-41, Secs. 53, 54, 55). After citing a number of cases, his summary is—

"A tax on an occupation or business act generally, which might be carried on either by a corporation or by an individual, is a simple privilege tax, etc.

"A special tax on a domestic corporation, or one measured by the amount of earnings or dividends, or business done, is generally a privilege tax, and the privileges or franchises thus taxed may be both a privilege of continued corporate existence, and the privilege of doing the business for which the corporation is organized, or either.

"A specific tax on a foreign corporation, measured by the amount of business done, or by the amount of receipts or earnings or dividends, is generally a tax on the privilege of doing business in the State. A tax on a domestic or foreign corporation which involves a valuation of property, by reference to the amount of capital stock and an assessment upon such valuation, is generally a property tax etc." (p. 53, Sec. 67).

The conclusion is that, while a corporate franchise is property and a valuable asset of the corporation, yet the term *franchise tax* may be used to indicate a license or privilege tax—in other words, a tax imposed by the State for the continued privilege of exercising the franchise in the State.

In order to ascertain the meaning which the Legislature attached to the word, and the intent of the law, it becomes necessary to examine the several laws on the subject:

Section 2364 of the Code of 1907 provides that "There shall be subject to taxation, in this State, the franchises, or intangible property, and assets of each and every corporation, whether organized under the laws of this State or of any other State or government, etc."

Section 2365 provides for the same rate of taxation on this intangible property as on the tangible property, and the succeeding sections provide for reports and statements, upon which the value of such intangible property may be determined.

Section 2391 provides that "Every foreign corporations, authorized to do business in this State (with certain exceptions) shall pay
55 annually to a judge of probate of a county in which it has a resident agent a franchise tax for the use of the State, and for the amounts specified in the next succeeding section."

The succeeding section classifies them according to the amount of capital employed in the State, to-wit, on a corporation having capital employed in this State of $100.00 or less, twenty-five per cent; on those whose capital so employed exceeds $100.00 but does not exceed $1000.00, twenty-five per cent on the first $100.00, and five per cent on the remainder, etc.

In accordance with the principles before adverted to, we are of opinion that the intention of this act was not to levy an assessment on the franchises as property, but to add to the license tax already required an additional privilege tax for the continued exercise of the corporate franchises in the State.—*Spira et al. v. State*, 146 Ala. 177, 178.

The complaint shows that the appellant corporation paid the license fee required by law, when it complied with the other conditions necessary to do business as a corporation in this State, and also the annual license tax required by law. The payment of these fees conferred upon the individuals the right to be a corporation in Alabama, and upon the corporation the franchise to engage in the business for which it was organized, with the rights thereto appurtenant, though it is not denied that the State may afterwards add a tax on the franchise, "as a royalty to the grant," in accordance with our decisions before cited. That royalty may be added in the shape of a tax on the franchise, as a valuable asset of the corporation, unless prohibited by some clause of the Constitution, or in the shape of a privilege tax for the continued exercise of its franchises.

So the question arises, can the State, after a foreign corporation has complied with previous laws, so as to be licensed to do business in the State as a corporation, has paid all annual licenses, required, and has paid all taxes on property, required of corporations
56 including a franchise tax, still require it to pay a large additional amount as a franchise tax, which is levied on foreign corporations alone?

The statement of this proposition would furnish its own answer,

if the question arose between two individuals, residents of the Stat
The next inquiry therefore, is whether there is anything in th
nature, position and standing of a foreign corporation which mak
such a discrimination valid.

It is familiar law that a State may allow a foreign corporatio
to transact business, within its limits, on such terms as it ma
please, or may exclude it entirely. The license, in the absence
special terms, is a mere revocable one, which may be recalled
burdened with additional restrictions provided the Constitution
the United States is not violated—*Doyle v. Continental Ins. C*
94 U. S. 535, 541, and cases cited; *Mutual Life Ins. Co. v. Spratl*
172 U. S. 602, 620; *Security Mutual Life Ins. Co. v. Prewitt*, 2
U. S. 246, 249.

Under the foregoing, and other authorities, the law in questio
is not violative of the clause in our constitution, nor of that
the United States Constitution, in regard to the impairing of th
obligations of a contract, unless there are some special featur
connected with the granting of license to this corporation, whic
differentiate it from the ordinary case of a license granted to
corporation.

Section 1169 of the Code of 1896, under which the purchases
this case were made, provides that "such railroad so purchased sha
be, in all respects, subject to the laws of this State, as if owned b
a domestic corporation, and all liens and rights of creditors sha
be preserved."

A statute of Colorado, prescribing certain conditions necessa
for a foreign corporation to enter the State, concluded with the
words: "and such corporations shall be subjected to all the liabi
ties, restrictions and duties which are, or may be, imposed upo
corporations of like character, organized under the general laws
this State, and shall have no other or greater powers."

57 After the corporation in question had complied with t
provisions of the then law, and had invested a considerab
amount in its business in said State, the legislature passed an a
placing upon domestic corporations a tax of two cents upon ea
thousand dollars of capital stock, and upon foreign corporations
tax of four cents on each thousand dollars of capital stock.

The Supreme Court of the United States held this act to be v
lative of the constitutional clause prohibiting any law impairing t
obligation of a contract, the court saying: "These provisions of la
existing when the corporation applied for leave to enter the Sta
made the payment, required and received its permit, amounted to
contract that the forign corporation so permitted to come in
State and do business therein, while subjected to all, should n
be subjected to any greater liabilities, restrictions or duties th
then were, or thereafter might be, imposed upon domestic corpo
tions of like character." The court also says: "Nor is this a c
where the power given by the state constitution to the gene
assembly, to alter, amend or annul a charter, is applicable. T
act does not alter the charter or annul or amend it. It simply
creases the taxation, which, up to the time of its enactment, had be

imposed on all foreign corporations doing business in the State."—*American Smelting Co. v. Colorado*, 204 U. S. 103, 112–13–14–15.

In a previous decision of that high court, written by the same Justice, it was held that a provision in the California Water Act of 1862, prohibiting county boards from reducing water rates below a certain point, did not create, with corporations thereafter incorporated, a contract which the State was bound by in subsequent legislation, and that the State could reduce the rates below that point without violating the contract clause of the Constitution. A number of cases are reviewed and analyzed in the opinion, and while the court holds that this power to amend is not without limit, even when reserved in the constitution of the State, and that sheer oppression and wrong could not be inflicted, under the guise of amendment or alteration, yet "a mere reduction of rates, while still leaving reasonable and fair compensation for the use of the property, is not prohibited."—*Stanislaus Co. v. San Joaquin C. & I. Co.*, 192
58 U. S. 201, 213. See also, *Wisconsin etc. R. Co. v. Powers*, 191 U. S. 379, 383–386–7.

It will be noticed that, in the Smelting Company case, the provision defining the status of the corporation, was in the act providing for the entry of the corporation into the state, so that, when the corporation complied with the terms, paid the entrance fee, and received its certificate, the contract was formed; while, in the case now under consideration, there were no such provisions in the statute under which the corporation entered the State, but only in the statute which authorized it to purchase the property of domestic corporations, and the claim of the appellant is that the general law of the State is incorporated into the contract between it and the selling corporation. It will be noticed also that section 1169 of the Code of 1896 does not say anything about what shall be the status or rights of the purchasing corporation, but only that "such railroad so purchased shall be in all respects subject to the laws of the State, etc."

Section 23 of Article I of the Constitution of 1875 prohibited the State from making any "irrevocable grants of special privileges or immunities," and this was as much a part of the contract of purchase of the railroad property as was section 1169 of the Code of 1896.

We hold, then, that the act complained of is not violative of said section of the Constitution of 1875, nor of section 10 of Article I of the Constitution of the United States.

The only effect of the act complained of, is to recall or revoke so much of the privilege granted, as authorized the foreign corporation to do an intra-state business. The corporation remains the same, and the railroad the same, and the pleadings in this case do not raise any issue as to the result of the tax's working "oppression and wrong."

The fact that section 242 of the Constitution places certain duties on railroad companies, has no bearing on this question, for, if the State itself prohibits the corporation from doing intra-state business, it could not be subjected to liability for not doing it.

The Act does not interfere with the interstate business of the railroad company, and there is nothing in the pleading to raise the question that the enforcement of the statute would interfere
59 with the interstate business. Therefore the Act is not invalid on that account.—*Osborne v. Florida*, 164 U. S. 650.

The next insistence of the appellant is that the act complained of is violative of that provision of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall * * * deny to any person, within its jurisdiction, the equal protection of the laws."

It is settled by the decisions of the Supreme Court of the United States, that, while a corporation is not a "citizen," within the meaning of that instrument, yet it a "person," within its terms.

There cannot be any controversy as to the point that a corporation of another state, which has complied with the laws of this State so that process can be served upon it, and paid the fees required for the privilege of doing business in this State, and also purchased property in the State and entered upon the transaction of the business authorized, is "within" the "jurisdiction" of the State.—*Blake v. McClung*, 172 U. S. 239. In fact, the claim of the State to impose a tax on the corporation, carries with it an admission that it is within the jurisdiction of the State.

In a case where a state board of equalization assessed the franchises and other property of a corporation, at a different rate and by different methods, so as to result in "an enormous disparity and discrimination between the various assessments on corporations," it was held to be a violation of the Fourteenth Amendment.—*Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37-8.

An Act regulating the charges in stock yards of certain size was held to be violative of the Fourteenth Amendment, because there was only one stock yard of that size in the state, the court saying "While recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast on the other.—*Cotting v. Kansas City etc. Co. & Kansas*, 183 U. S. 79.

60 In another case deciding that the state has a right to fix conditions upon which a corporation may do business in the State and holding that a corporation is not a citizen, the court says that the object of the Fourteenth Amendment is "to prevent any person or class of persons from being singled out, as a special subject of discriminating and hostile legislation. Under the designation of *person* there is no doubt that a private corporation is included * * * The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations, within the jurisdiction of the state."—*Pembina M. Co. v. Pennsylvania*, 125 U. S. 181, 188-9.

In another case, while sustaining the right of the State, as a purely police regulation, to prohibit laundry work in certain localities, the court, commenting on the Fourteenth Amendment, said, among other things, that it requires "that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others, under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." *Barrier v. Connolly*, 113 U. S. 27, 31; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 238; Gray's Limitations of Taxing Powers, Secs. 1114, 1115.

The Supreme Court of Kentucky, while holding that a corporation is not a "citizen," and may have imposed upon it such conditions as the state may choose to require, yet said, "If any state * * * should allow a corporation of another state to transact business as a corporation within its limits, and to acquire property there, the rights and property thus legally acquired, being held by the corporators, may be entitled to the same protection, under this clause of the constitution, as if held by the corporators themselves."—*Commonwealth v. Milton* (12 B. Mon. 212) 54 Am. Dec. 522, 529–30.

On the other hand, the Supreme Court of Iowa sustains the right of a state to impose a higher tax on foreign corporations than is imposed on domestic corporations, basing its conclusions partly on the general principle that the state has absolute power over foreign corporations, and partly on a misunderstanding to the effect that, in the *Pembina Case* (125 U. S. 180), the Supreme Court of the United States had held that a corporation is not a "person," when
61 in fact the decision in that case is that although a corporation is not a "citizen," it is a "person" (p. 189). *Scottish etc. Ins. Co. v. Herriott* (109 Iowa, 605), 77 Am. St. 548, 555.

The case of *Paul v. Virginia* (8 Wall. 168), which is frequently referred to in the decisions, came up on an application for a license, and was based on the principle that a corporation is not a citizen.

The Supreme Court of Illinois held that the state may rightfully discriminate against a foreign insurance company, in levying taxes (*Ducat v. City of Chicago*, 48 Ill. 172), and that decision was affirmed by the Supreme Court of the United State.—*Ducat v. Chicago*, 10 Wall. 410. It is true that this decision rests upon other provisions of the United States Constitution relating to "citizens," and no mention is made of the Fourteenth Amendment, yet said Fourteenth Amendment was then in force.

The Supreme Court of California held that, after a foreign corporation was permitted to do business in that state, the state could not impose upon it conditions not imposed upon citizens, under the uniformity clause of the California statute.—*San Francisco v. Liverpool etc. Ins. Co.* (74 Cal. 113), 5 Am. St. Rep. 425.

The annotator in Cyc., referring to this case, says: "However this may be it is clear that it violates no principle of the Federal Constitution, as the Supreme Court of California seems to suppose."—19 Cyc. 1228.

Upon the whole, while we are free to confess that this point makes a deep impression on our minds, yet this is a matter which should

be passed upon by the Supreme Court of the United States, and
hold that the decisions are not so clear as to authorize this court
declare the act in question violative of the Fourteenth Amendm
to the Constitution of the United States.

The second section of the Act (1907, p. 421) is not violative
section 45 of the Constitution of 1901. The title of the Act is su
cient to cover the levy for County purposes, the same being referri
and cognate to the general subject of providing revenue for
state. If there were no mention of the counties the commissione
court of each county could levy a tax for such county.—Code, 19
Sec. 2155.

62 The judgment of the court is affirmed.

Dowdell, Denson, McClellan, and Mayfield, JJ., conc
Anderson, J., dissents.

ANDERSON, J. (Dissenting).

I agree with my brethren upon the proposition that all dou
should be resolved in favor of the validity of the act assailed, wh
the assailant has the right of appeal to the Supreme Court of
United States, and that the State's right to do so is questionable.
do not think, however, that the infirmity of the act in question
open to serious doubt; and notwithstanding the high regard I ha
for the opinion of my associates, the infirmity of the act is to me
glaring that I deem it my imperative duty to construe the law a
understand it—regardless of consequences or whether the State h
or has not, the right of appeal.

Pretermitting the other questions insisted upon by appellan
against the validity of the Act in question, I am of the opini
that it is violative of the Fourteenth Amendment to the Fed
Constitution, in that the classification attempted is so unreasona
and unjust as to amount to a discrimination against one and in fa
of other members of the same class. The classification has no re
ence to the subject or business but is based solely on the reside
of the corporation. There can be no doubt, that the states have
right to require certain things of foreign corporations as a condit
precedent to doing business therein, but when they enter the St
upon its invitation, and after complying with its requirements, th
are entitled to the equal protection of the law and which include
guaranteed uniformity in taxation. To my mind equal protect
is not accorded when one railroad is taxed thousands of dollars m
than others of equal value and similarly situated, the only disti
tion being that one is a foreign and the other a domestic corporati

notwithstanding the tax may be designated as a franch
63 tax in order to avoid the influence of the State Constitut
against unequal taxation on property. That the state m
levy a reasonable franchise tax on corporations there can be no dou
but it has no right to levy such a tax on one and relieve another
gaged in the same identical business, simply because one is fore
and the other is domestic. The right of the state to prescribe c
ditions upon which a foreign corporation should enter refers to
tax imposed for the privilege of acting in a corporate capacity in

state. "It does not mean that, after the corporation has been admitted into the state and paid the charge exacted for admission, it is not entitled to due process of law or the equal benefit of the laws, under the Federal Constitution, or equality and uniformity under the state government. The situation is therefore analogous to that of a domestic corporation. The state may impose such exaction as it pleases as a condition for granting the corporate franchise, but when the corporation is organized, its property is to be taxed as other property, subject to such classification and qualification as may lawfully be made."—Judson on Taxation, Sec. 168.

It may be that the state has the right to prevent the doing of intrastate business by a non-submitting corporation, and which is the penalty prescribed by the statute; but it must be born in mind that we are dealing with the state's right to collect and retain this illegal tax and not with its right or recourse against plaintiff for resisting the right to collect and retain said tax.

The question before us is, was the tax lawfully levied? If it was, the plaintiff cannot recover, if not legal it can recover it back. What the state can and will do for a refusal to submit we are not called upon to decide, "sufficient unto the day is the evil thereof," as we are dealing with the right to levy and collect and not the penalty for a refusal to submit. Should the state attempt to deprive many
64 of her citizens dependent solely on foreign corporations for a means of travel and transportation, because said corporations do not submit to an unjust discrimination, will, of course, work a hardship upon many of her inhabitants and deprive them of the advantages and conveniences of the present age of progress and enterprise, and which cannot be taken for their more fortunate neighbors situated on domestic lines, and would create a condition to be deplored. But this threatened and impracticable disaster should not deter courts from condemning all laws of an unjust and discriminatory character such as the one in question.

I regret my inability to concur in the conclusion of my brothers and am constrained to voice my protest against this statute as it involves not only a year's taxation but a principle so far reaching and important as to not only affect the integrity of the State but threatens the sacred rights secured by our Federal Constitution. Citation of authority is not required to demonstrate the inequality of this law and that the classification therein attempted is unreasonable and unjust. Nor do I feel it necessary to comment on many of those mentioned in the opinion but will content myself with a short discussion of what seems to be the three leading cases relied upon as supporting the conclusion of the majority.

The case of *Ducat v. Chicago*, 10 Wall. 410, does not apply to the present question. There the Fourteenth Amendment was not considered, and while the case may have been decided subsequent to the adoption of same, the statute considered was enacted prior to the amendment and the alleged violation of same was anterior to said amendment.

The cases of *New York v. Roberts*, 171 U. S. 658 and *Horn Silver Mining Co. v. New York*, 143 U. S. 305, do not support the law in

question. The statutes there considered, dealt with foreig
domestic corporations in the same manner. Indeed, the opin
each case is guarded on this point and stresses the fact, that the
no discrimination against foreign corporations, simp
65 cause they were foreign instead of domestic. In the
Silver Mining Co., case, supra, the court, speaking th
Justice Field says: "It does not lie in any foreign corporat
complain that it is subjected to the same law with the domest
poration." And in the *Roberts case, supra* we find the fol
guarded expression: "It will be perceived that the tax is pres
as well for New York corporations as for those of other states,
true that manufacturing or mining corporations wholly enga
carrying on manufacture or mining ores within the state o
York are exempted from this tax, but such exemption is
stricted to New York corporations, but includes corporations o
states as well, when wholly engaged in manufacturing with
State." It is therefore inferable that the statute would have
condemned had it discriminated against foreign corporations
same class as the domestic ones and which is done by the
question.

I dissent from the conclusion of the majority and think th
was illegal and the plaintiff should recover it back.

66 In the Supreme Court of Alabama.

CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant,
vs.
JOHN B. GASTON, Appellee.

I, Robt. F. Ligon, Clerk of the Supreme Court of the St
Alabama, by virtue of the annexed writ of error, and in obe
thereto, do hereby certify that the foregoing pages numbered
1 to 64, both inclusive, contain a true, full and complete tra
of the record and proceedings had in said Court, in the case o
tral of Georgia Railway Company, Appellant vs. John B. G
Appellee (3 Division No. 803), together with a true and corre
of the opinion of the Court in said cause, and a true and corre
of the opinion of the said Supreme Court in the case of So
Railway Company vs. Samuel E. Greene, appealed from the Bi
ham City Court, as the same appears of record on file in this

In testimony whereof, I have hereunto affixed my official
ture, as Clerk of the Supreme Court of Alabama, and have
the seal of said Supreme Court to be hereunto affixed at the C
in the City of Montgomery, Alabama, on the 8th day of May,
A. D.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alaba

67 In the Supreme Court of the United States, October Term, 1908.

CENTRAL OF GEORGIA RAILWAY COMPANY, Petitioner,
versus
JOHN B. GASTON, Respondent.

To the Honorable Chief Justice of the Supreme Court of the State of Alabama.

The petition of the Central of Georgia Railway Company, a corporation, respectfully shows: That the Central of Georgia Railway Company as plaintiff sued to recover of John B. Gaston, as defendant, the sum of Eleven Thousand Three Hundred Seventy One and 44/100 ($11,371.44) Dollars, on, towit, the 28th day of March, 1908, in the City Court of Montgomery; that on, towit, the 23rd day of October, 1908, the said City Court of Montgomery rendered a judgment: "That the defendant go hence and recover of the plaintiff the costs in this behalf expended, for all of which let execution issue"; that from said judgment the said Central of Georgia Railway Company prayed and obtained an appeal to the Supreme Court of Alabama on, towit, the 25th day of October, 1908, and that on the 11th day of Feb., 1909, said Supreme Court of Alabama, which was and is the highest Court of said State in which a decision in said suit could be had, rendered its judgment affirming the said judgment of the City Court of Montgomery.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the provisions of the revised statutes of the United States, because, in and by said suit there was drawn in question the validity of a statute of the State of Alabama, viz: the act of the Legislature of the State of Alabama, approved March 7th, 1907, entitled, "An Act, to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax", upon the ground that it, the said Act is repugnant to the Constitution of the United States and is repugnant to the Constitution of the State of Alabama, and that the said judgment or decision of the Supreme Court of
68 Alabama, for the removal whereof to the Supreme Court of the United States, a writ of error is prayed, is in favor of the validity of said Act.

The said Central of Georgia Railway Company, by its attorneys, claimed and contended in said City Court of Montgomery, when said cause was there pending, and in said Supreme Court of Alabama, when said cause was there pending,

First. That the petitioner, Central of Georgia Railway Company, was, and still is, a corporation duly organized and existing under the laws of the State of Georgia, and was, and still is, authorized and empowered to do business in the State of Alabama, under the laws of the State of Alabama, as a common carrier by railroad, and was and is doing business as such common carrier by railroad in the State of Alabama;

That it was and is authorized by the laws of the State of Alabama to do an inter-state and intra-state business as a common carrier railroad corporation in the State of Alabama, and owned and operated in said business, in said State, many million dollars, in value, of railroads and a large amount of equipment; that if it was not permitted to do an inter-state business in Alabama, petitioner could not earn on such property, the cost of operating the same, and the value of said property would be thereby ruined or rendered practically valueless; that petitioner had complied with all the laws of the State of Alabama as was required of it as a foreign corporation, by the Constitution and laws of the State of Alabama, in order to authorize it to do business in the State of Alabama, and to that end, it had a known place of business in the State of Alabama, viz: in the County of Montgomery, in said State; that it had named an authorized agent residing thereat; that it had filed with the Secretary of State of the State of Alabama a certified copy of its charter and all amendments thereto, and also an instrument in writing, under its corporate seal, signed officially by its President and Secretary, designating a known place of business in the State of Alabama and an authorized agent residing thereat; that it had also paid each year, at or within the time prescribed by the laws of the State of Alabama, its annual license tax to be paid by foreign corporations doing business in Alabama, and had received a license from the Secretary of State of the State
69 of Alabama, authorizing it to do business in the State of Alabama as a common carrier railroad, for many years prior to and during the year, 1908.

That your petitioner qualified in good faith to do business in the State of Alabama, as aforesaid, and that it paid the sum of Eleven Thousand Three Hundred Seventy-one and 44 100 ($11,371.44) Dollars to the said John B. Gaston, who was the Judge of Probate of Montgomery County, Alabama, under protest and under duress, and because of the excessive and onerous penalties provided in said act of March 7th, 1907, and especially because said statute provided that: "No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce or maintain or demand any action in any of the Courts of this State upon a contract made in this State, other than contracts based upon inter-state commerce, unless such corporation shall have paid such tax within sixty days after the same became due." Petitioner paid said sum under protest and duress, as stated above, and forthwith notified the Respondent John B. Gaston, that it would sue him to recover the same, giving him written notice, a copy of which said notice and protest was set out in the complaint, as hereinafter set out in the record, designated as "Exhibit B" to the complaint; said notice stated, among other things, that the so-called franchise tax so paid was unconstitutional and void, because, among other reasons, the imposition *it* of said so-called franchise tax was an unjust discrimination against petitioner and a denial of the equal protection of the laws, in that it is not imposed alike on all corporations and individuals within the jurisdiction of the State of Alabama, engaged in the same class of business, but is imposed only on foreign corporations within the jurisdiction of the State of Alabama and

authorized to do business therein, but is not imposed upon domestic corporations or *individuals engaged in the same business*, under substantially the same circumstances, and no such tax, or similar tax whatever, is imposed for State and County purposes upon domestic corporations engaged in doing business as common carriers by railroad in the State of Alabama, either upon their capital stock or any part thereof, or upon the actual amount of their capital employed in the State of Alabama.

Second. Petitioner further contended in said City Court
70 of Montgomery, that of the sum of Eleven Thousand Three Hundred Seventy-one and 44 100 ($11,371.44) Dollars, the sum of Three Thousand Seven Hundred Ninety and 48 100 ($3790.48) Dollars was demanded of it, and paid by it, as a franchise tax alleged to be due by the petitioner under the second section of the Act of the Legislature of Alabama, approved March 7th, 1907, entitled as aforesaid, and that said Section of said Act is violative of Section 45, Article 4 of the Constitution of the State of Alabama and is void.

Petitioner further contended that said second section of said Act was violative of Sections 104, 105 and 106 of the Constitution of the State of Alabama, or one or more of said Sections, in that said Act is in effect a local law and void, averring that no notice of the intention to apply for the passage of said law was published in the manner provided and required by Section 106 of the Constitution of the State of Alabama.

Petitioner further claimed that said Respondent, John B. Gaston, the Judge of Probate, would not receive the said sum of Seven Thousand Five Hundred Eighty and 93 100 ($7580.93) Dollars, alleged by him to be due under said act for the use of the State of Alabama, without the payment also of said sum of Three Thousand Seven Hundred Ninety and 48 100 ($3790.48) Dollars for the use of the County, under the second section of said Act.

Third. Petitioner contended that by Section 229 of the Constitution of the State of Alabama, adopted November 28th, 1901, it is provided that the Legislature should, by general law, provide for the payment to the State of Alabama, of a franchise tax by corporations organized under the laws of this State (except strictly benevolent, educational and religious corporations), which shall be in proportion to the amount of capital stock, and in Section 232 of said Constitution, it is provided, that the Legislature shall, by general law, provide for the payment to the State of Alabama, of a franchise tax by foreign corporations (except strictly benevolent, educational and religious corporations) but that such franchise tax shall be based upon the actual amount of capital employed in this State. That the Act aforesaid, approved March 7th, 1907, by which
the Legislature of Alabama undertook to impose the so called
71 franchise tax, was enacted by the Legislature of Alabama in pursuance of Section 232 of the Constitution, which section, so far as it attempts to authorize the Legislature by general law to provide for the payment to the State of Alabama of a franchise tax by foreign corporations authorized to do business in this State and

within the jurisdiction of this State based upon the actual amount of capital employed in this State, without requiring the same tax, on the same basis, from domestic corporations in the State of Alabama, authorized to do and doing business of the same or like character therein, constituted a denial to petitioner (which had been authorized to do business in this State a long time prior to the present Constitution of Alabama, and was then and has ever since been so engaged as a common carrier by railroad) of the equal protection of the laws in violation of Section One, of the Fourteenth Amendment to the Constitution of the United States, and was therefore unconstitutional and void, so far as the same affected petitioner, and petitioner claimed the protection of the provisions of the said first Section of the Fourteenth Amendment to the Constitution of the United States and the right thereunder to recover the money sued for.

Fourth. Petitioner claimed, contended and averred, that, continuously since it commenced to carry on its business in the State of Alabama, there had been assessed against it annually, on account of the ownership by it of property within the State, *ad valorem* taxes similar to those assessed against other persons and corporations owning like property, for the benefit of the State, counties, municipalities and taxing districts and jurisdictions in Alabama, all of which the petitioner had paid. That it had also paid, from year to year, the license tax exacted of it, and of other persons or corporations operating railroads in Alabama, under the provisions of Section 3489 of the Code of Alabama of 1896, up to and including the license tax, based on gross earnings, imposed by said Section 3489 of the Code of Alabama of 1896, towit, June 1st, 1907, for the year ending, towit, May 31st, 1908, to pay the annual expenses of the Railroad Commission of Alabama, as authorized by law. That petitioner has also paid, on account of such ownership and
72 operation of its railroads in Alabama, all the taxes assessed against it, under the Act of the Legislature of Alabama, approved March 4th, 1907, entitled "An Act, to make subject to taxation and to tax the franchise or intangible property and assets of every person, association, company and corporation engaged as a common carrier in this State, in the business of transporting persons or property over any railroads, or any other business which may be dependent upon the grant of public power and privileges or which may involve the operation of any public utility, and to provide for the valuation and manner of ascertaining the values of such franchise or intangible properties and the distribution of the same for local taxation, and the levy, assessment and collection of said taxes thereon."

That it had also paid the license fee and obtained the license provided for in the Act of the Legislature of Alabama, approved, March 4th, 1907, entitled "An Act, to further regulate the doing of business in the State of Alabama by foreign corporations, or non-resident corporations, or corporations organized under and by authority of the law of any other State or government than the State of Alabama, and to fix a punishment for the violation thereof."

Fifth. Petitioner contended that it had paid each and every tax and license required of it by the State of Alabama, and that all these exactions had been made by the State of Alabama upon corporations owning and operating a railroad in Alabama without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized and existing under the laws of some other State, with the sole exception of the license fee required by the Act approved March 4th, 1907, which is a nominal amount, $10.00 per annum, and is exacted of foreign corporations for, as your petitioner was advised, mere police purposes, and in order that there might be a registration kept in the office of the Secretary of State of such foreign corporations doing business in Alabama.

Sixth. Petitioner contended in said complaint that to the contrary, however, the Act of the Legislature approved March 7th, 1907, of which petitioner complained in its complaint, and
73 under which it was compelled to pay the sum sued for in said complaint, does not apply and was not intended to apply to any resident person or domestic corporation of the State of Alabama owning the same character of property and carrying on the same kind of business in Alabama as is owned and carried on in Alabama by corporations organized and existing under the laws of another State, nor was there any like or similar exaction by the laws of Alabama of or against domestic corporations or resident individuals owning such a like property or engaged in such a like business; that all during the time it was doing business in Alabama, that the said State had exercised its jurisdiction over petitioner continuously; that it had subjected petitioner to the same laws to which resident persons and domestic corporations carrying like or similar business had been subjected, until the enactment of the statute complained of; that the laws of the State of Alabama had created a Railroad Commission with large and extensive powers and authority over petitioner and all other persons and corporations owning and operating railroads in Alabama and that the said Commission at divers times and continuously since the petitioner began to carry on its business in the State of Alabama exercised its power, authority and control over petitioner in sundry ways and to exactly the same extent and in the same manner as it exercised the same over other persons and corporations conducting like and similar business and owning and operating railroads as common carriers of freight and passengers in Alabama.

Seventh. Petitioner contended that the Act complained of as construed by the defendant imposed a tax on the value of the petitioner's property in Alabama not equal or uniform, nor levied nor assessed in exact proportion to the value of all like property within the State of Alabama and when added to the property tax imposed by the laws of this State, constituted a greater rate of taxation in each year for State purposes than sixty-five one hundredths (65/100) of one per centum (1%) on the value of the taxable property within this State owned by the petitioner, and the petitioner further contended that the property tax imposed by said Act

of March 7th, 1907, as construed by the Respondent, when
74 added to other proper taxes imposed by the County of Montgomery for County purposes, constituted a greater rate of taxation for each year for such purposes on the value of the taxable property within Alabama or in Montgomery County owned by the petitioner than one-half of one per centum.

Eighth. Petitioner contended that on, towit, the 29th day of February, 1908, it caused its officials to make a written statement, under oath, to the Respondent, as the Judge of Probate of Montgomery County, Alabama, in which said County petitioner had a resident agent, showing the name of petitioner corporation, the State under whose laws it was incorporated, its principal place of business in Alabama, the total amount of its capital stock employed by it in the State of Alabama, by which said statement it was shown that the actual amount of capital stock employed by petitioner in the State of Alabama, towit, $1,103,500.00; that thereupon Respondent, as such Judge of Probate, swore and examined one of petitioner's officers by whom it was shown that the actual amount of capital employed in the State of Alabama for the year ending towit, June 30th, 1907, in operating its railroad, exclusive of the amount invested in road-beds, equipment and other permanent property was, towit, $1,103,500.00 and the Respondent, as such Judge of Probate so found and declared. That petitioner's fiscal year is, and for a long time had been, from June 30th of each year to June 30th of the next preceding year, and that all of its accounts are, and had been for a long time kept from June 30th of each year to June 30th of the next year, and that said fiscal year from June 30th, 1906 to June 30th 1907 was petitioner's last fiscal year prior to the 29th day of February, 1908. Petitioner averred that the actual amount of capital employed by it in the State of Alabama for the calendar year ending January 1st, 1908, in operating its railroads, exclusive of the amount invested in its road-beds, equipment and other permanent improvements, did not exceed the said sum of, towit, $1,103,500.00, and that the amount of the franchise tax payable under said Act of March 7th, 1907, for the use of the State was, towit, ($1758.75) One Thousand Seven Hundred Fifty Eight and 75/100 Dollars. Petitioner further averred that Respond-
ent as such Judge of Probate further found that said amount
75 of capital so employed by the petitioner in the State of Alabama did not constitute the true basis for determining the actual amount of capital employed by petitioner in the State of Alabama within the meaning of the said Act of the Legislature of the State of Alabama, but that the value of the petitioner's tangible property employed in the State of Alabama, without deducting therefrom the amount of mortgages and liens thereon, was the actual amount of its capital employed in the State of Alabama within the meaning of the said Act and that upon this basis, the amount of petitioner's capital so employed was towit, Seven Million Five Hundred Eleven Thousand Nine Hundred Sixty-Four and 65/100 ($7,511,964.65) Dollars, and he further found that the sum of, towit, $7,580.96 was the amount of the franchise tax due

by the petitioner to the State of Alabama under said Act, and that the sum of, towit, $3790.48 was the amount of such tax due to the County of Montgomery and that said sums aggregated $11,371.44, which said sum the Respondent, as such Judge of Probate, demanded of the petitioner and declined to receive any smaller sum.

Ninth. Petitioner contended and averred that it was a person subject to or within the jurisdiction of the State of Alabama in the sense and meaning of Section One of the Fourteenth Amendment to the Constitution of the United States; that on, towit, the 29th day of February, 1908, on the report made to the Respondent, as such Judge of Probate, it set forth its capital stock, as was and is a fact, at $5,000,000.00, and that it had actually employed in the State of Alabama, of said capital stock the sum of $1,103,500.00, but that said Respondent, as such Judge of Probate, declined to accept the said report or return, and the amount of tax based upon the capital employed in the State of Alabama, as thus shown, but after an examination ascertained the amount as hereinbefore stated.

Petitioner contended that the Act of March 7th, 1907, complained of was unconstitutional and void and of no effect, for that:

a. Said act was violative of the Fourteenth Amendment to the Constitution of the United States, in that it denied to petitioner, and all other foreign corporations doing business in the State of Alabama, equal protection of the laws; that it took their property without due process of law by discriminating against petitioner, and all other foreign corporations doing business in
76 Alabama, in favor of domestic corporations.

b. That said Act of March 7th, 1907, was contrary to the Fourteenth Amendment to the Constitution of the United States in that it denied to petitioner and all other foreign corporations engaged in business in the State of Alabama, the equal protection of the laws and took their property without due process of law, by discriminating against petitioner, and all other foreign corporations, in favor of domestic corporations, for that: Under Section 229 of the Constitution of Alabama, the Legislature of Alabama was directed to provide for the payment of a franchise tax by corporations organized under the laws of said State, which should be in proportion to the amount of capital stock; that under Section 232 of said Constitution, the Legislature was directed to provide for the payment to the State of Alabama of a franchise tax by foreign corporations, but such franchise tax, the Constitution provided, should be based on the actual amount of capital employed in Alabama; that the only law under which any tax of this or like character was exacted of domestic corporations was contained in Section 1122 of the Code of Alabama of 1896, as amended by the Act of March 7th, 1901, entitled "An Act to further amend the revenue laws of the State of Alabama," under the twenty-fourth Section of which it is provided: "All corporations doing business in this State, whether organized under this State or another State or country, not otherwise specifically required to pay a license tax, shall pay annually the following privilege tax: Where the paid up capital stock exceeds $1,000,000

00—$500.00." That clause F of the first Section of the said A
of March 7th, 1907, provides: "No foreign corporation which h
paid the tax required under this Act shall be required to pay t
tax imposed by sub-division twenty-four of Section 4122 of t
Code of 1896, as amended by the Act of the General Assembl
entitled, "An Act, to further amend the revenue laws of the Sta
of Alabama," approved March 5th, 1901. So that, petitioner ave
that foreign corporations are excepted from said Code section 412
as amended by the Act of the Legislature of March 5th, 1901, a
that said Code Section, as amended, applies only to domestic c
porations; that under said Section, domestic corporations whe
capital stock exceeds $1,000,000.00 are required to pay t
77 sum of $500.00, whereas petitioner, whose capital stock e
ceeds $1,000,000, has been taxed, under the Act of Mar
7th, 1907, and required to pay the sum of $11,371.44, of whi
$7580.96 is paid to the State and $3790.48 is paid to the County.

Petitioner contended that this di-tinction made by the State
Alabama between domestic corporations and foreign corporatio
was arbitrary and unjust and denied to the petitioner, and all oth
foreign corporations, the equal protection of the laws and took the
property without due process of law, contrary to the Fourteen
Amendment to the Constitution of the United States.

c. Petitioner contended that said Act of March 7th, 1907 was co
trary to the Fourteenth Amendment to the Constitution of t
United States in that; it denied to the petitioner and all other foreig
corporations the equal protection of the laws and took their pro
erty without due process of law, in that: petitioner, and all oth
foreign corporations were required to pay a franchise tax annual
to a County of the State in one-half of the amount of the franchi
tax which they are required to pay to the State, whereas, domest
corporations are not required to pay any franchise tax of any cha
acter to any County in the State of Alabama.

d. That said Act of March 7th, 1907, was unconstitutional a
void and contrary to the Fourteenth Amendment to the Constitutio
of the United States in that: petitioner, and all other foreign corpor
tions, were required to pay a franchise tax based on the actual amou
of capital employed in the State, whereas domestic corporations a
not required to pay the same or similar tax based on the amount
actual capital employed in the State and that a different and great
method is applied to petitioner, and other foreign corporation
than is applied to domestic corporations, and that the classificatio
of corporations into domestic corporations and foreign corporation
for the purpose of imposing franchise taxes, is arbitrary, unjust a
unequal and denied to petitioner, and other foreign corporations t
equal protection of the laws and took their property without du
process of law, contrary to the Fourteenth Amendment to the Co
stitution of the United States.

e. That the Act was violative of Section 214 of the Cons
78 tution of Alabama, which provided that the Legislatu
should not have the power to levy in any one year a great

rate of taxation than sixty-five hundredths (65/100) of one per centum (1%) on the value of the taxable property within this State.

f. That the Act is contrary to the provisions of Section 211 of the Constitution of Alabama, which provides that all taxes levied on property in this State shall be assessed in exact proportion to the value of said property.

g. That said Act is contrary to the provisions of Section 217 of the Constitution of Alabama, which provides, that the property of private corporations, associations and individuals in this State shall forever be taxed at the same rate.

h. That the Act is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States for that it denies to the petitioner the equal protection of the laws, in that the property of the petitioner which is located within the State of Alabama is taxed by the State of Alabama at a higher rate than is similar property of other persons assessed under precisely the same circumstances and conditions.

i. That the said Act is contrary to paragraph three of Section eight, of Article one, of the Constitution of the United States, in that the so called franchise tax imposed thereby is in substance and effect a burden upon the business of inter-state commerce, which the petitioner conducts in the State of Alabama, and is a regulation or attempted regulation thereof.

j. That said Act of March 7th, 1907, was contrary to paragraph one, of Section ten, of Article One of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in that the petitioner had complied with all of the laws of the State of Alabama authorizing it to do business in this State.

Tenth. Petitioner contended that by virtue of the Acts hereinabove set out, with which it had complied, that it had in effect a valid and subsisting contract with the State of Alabama, whereby it was authorized and empowered to conduct its business in the State of Alabama, both domestic and inter-state, for which it has paid to the State of Alabama a valuable consideration, and in reliance upon the Acts of the Legislature has made many con-
79 tracts and created many obligations, wherefore, petitioner contended that the so-called franchise tax Act of March 7th, 1907, impaired the obligations of said contracts between the State of Alabama and the petitioner in that it attempted to impose upon the petitioner a tax for the privilege of doing precisely the same business which it already was authorized to do under and by virtue of the statutes of Alabama, and for which it had paid a valuable consideration.

Eleventh. Petitioner contended and averred that by coming into the State of Alabama under its invitation, qualifying according to its laws, building its railroad, making contracts and assuming obligations to operate its line of railroad both as an intrastate and interstate agency, that it obtained the right and assumed the obligations to use said properties in one inseparable business of a common carrier of inter-state and intra-state commerce in Alabama, and

that it became further bound by the provisions of the Constitutio and laws of Alabama to carry on the business of a common carrie both of inter-state commerce and intra-state commerce; that was engaged in one inseparable business of a common carrier inter-state and intra-state commerce in Alabama and that said A of March 7th, 1907, imposed upon said inseparable business unju burdens not imposed upon domestic corporations engaged in th same kind of business, under like circumstances, and was a burde and interference with or a regulation of inter-state commerce an was violative of Clause three, Section eight, Article One of the Co stitution of the United States, and the petitioner claims protectio under the said provisions of the Constitution of the United State against such interference with the inter-state commerce in whic it was engaged and against liability for the tax by said Act impose

All of which appears of record in said proceedings in said cau which is herewith submitted.

Whereof, petitioner prays for an allowance of a writ of erro returnable in the Supreme Court of the United States, and for cit tion, and it will ever pray etc.

CENTRAL OF GEORGIA RAILWAY COMPANY,
By A. R. LAWTON,
T. M. CUNNINGHAM, Jr.,
ROBT. E. STEINER,
Attorneys for Petitioner.

Filed this 3rd day of May, 1909.
ROBT. F. LIGON,
Clerk of the Supreme Court of Alabama.

80 In the Supreme Court of Alabama, Third Division.

No. 803.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plaintiff in Error,
versus
JOHN B. GASTON, Defendant in Error.

This the 3rd day of May, 1909, came the Plaintiff in error, th Central of Georgia Railway Company, and filed herein and pre sented to me, James R. Dowdell, the Chief Justice of the Supreme Court of Alabama, the above petition, praying for the issuance o a writ of error intended to be urged by it, and prayed also that transcript of the record, proceeding and papers, under which th judgment herein was rendered by the Supreme Court of Alabama duly authenticated, may be sent to the Supreme Court of the Unite States, and that such other and further proceedings may be had a may be necessary in the premises.

On consideration whereof, the said writ of error is hereby allowe upon the Plaintiff in error, the Central of Georgia Railway Com pany, giving a bond, according to law, in the sum of One Thousan

($1,000.00) Dollars, which bond being forthwith given and approved, let the writ of error issue, as prayed for.

This the 3rd day of May, 1907.

J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

Know all men by these presents; That we, the Central of Georgia Railway Company, as principal, and American Surety Company, as surety, are held and firmly bound unto John B. Gaston in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said John B. Gaston, his certain attorneys, executors, administrators, or assigns, and which payment well and truly to be made, we bind ourselves, our successors and assigns firmly and severally by these presents.

Sealed with our seals and dated this 3rd day of May, in the year of our Lord, 1909.

81 Whereas, at the present session of the Supreme Court of Alabama in a suit pending in said Court between the Central of Georgia Railway Company, as appellant, and John B. Gaston, as Appellee, a final judgment was rendered against the said Central of Georgia Railway Company, and the said Central of Georgia Railway Company having obtained the allowance of a writ of error, and filed a copy thereof in the Clerk's Office of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said John B. Gaston, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, within thirty days thereof; Now, the condition of the above obligation is such that if the said Central of Georgia Railway Company shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void, otherwise, to remain in full force and virtue.

CENTRAL OF GEORGIA RAILWAY COMPANY.
By R. E. STEINER,
Its Attorney of Record and in Fact.
AMERICAN SURETY CO. OF NEW YORK.
By C. G. ZIRKLE.

Approved by

J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

Supreme Court of the United States.

CENTRAL OF GEORGIA RAILWAY COMPANY, Plaintiff in Error
versus
JOHN B. GASTON, Defendant in Error.

Assignment of Errors.

Feeling itself aggrieved by the proceeding and judgment of
Supreme Court of Alabama in the above entitled cause, comes
plaintiff in error, Central of Georgia Railway Company, by its co
sel, and says that manifest error has been committed in the rec
and proceedings in said cause and assigns the following:

The Supreme Court of Alabama, in and by its judgm
82 rendered in said cause on the 11th day of Feb., 1909, er
in affirming the judgment rendered by the City Court
Montgomery, wherein said City Court of Montgomery sustained
demurrers of the defendant in error, John B. Gaston, to the or
nal and amended complaint in said cause, and rendered judgm
for the defendant thereon.

1. In and by the complaint filed in said cause, and the demu
of the defendant thereto, there was drawn in question the valid
of an Act of the Legislature of Alabama, approved March 7th, 19
entitled, "An Act to provide for the revenue of the State by requ
ing all foreign corporations authorized to do business in this St
under the laws of the State of Alabama, to pay an annual franch
tax", as violative of Section Ten, Article One of the Constitut
of the United States, in that, it violated the obligations of cert
contracts between the plaintiff in error and the State of Alabama

2. In and by the complaint filed in said cause, and the demurr
of the defendant in error thereto, there was drawn in question
validity of the said Act of the Legislature of Alabama, as violat
of the provisions of Section One of the Fourteenth Amendment
the Constitution of the United States, in that, it deprives the pl
tiff in error, the Central of Georgia Railway Company, of its pr
erty without due process of law and denies to it the equal protect
of the laws, in that said Act imposed upon said plaintiff in er
which was and is a person within the jurisdiction of the State
Alabama, burdens not imposed upon corporations organized un
the laws of said State and engaged in a like business under the s
circumstances, and in and by affirming the judgment of the C
Court of Montgomery, the Supreme Court of the State of Alaba
erroneously held and adjudged that the said Act of the Legisla
of the State of Alabama is valid and does not violate the provisi
of the said Section of the Fourteenth Amendment to the Const
tion of the United States.

3. In and by the complaint filed in said cause, and the dem
rers of the defendant in error thereto, there was drawn in quest
the validity of said Act of the Legislature of the State of Alaba

as violative of Clause Three, of Section Eight, of Article One
83 of the Constitution of the United States, in that said Act operates as an interference with the regulation of inter-state commerce by Congress, but by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that the said Act of the Legislature of the State of Alabama is valid and does not constitute an interference with the regulation of inter-state commerce by Congress.

4. In and by the complaint filed in said cause, and the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of Sections 104, 105 and 106 of the Constitution of Alabama, one or more, in that said Act was a local law and was not published according to the provisions of Section 106 of the Constitution of the State of Alabama, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that the said Act of the Legislature of the State of Alabama is valid and was not contrary to said Section or Sections of the Constitution of Alabama.

5. In and by the complaint filed in said cause, and the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of Sections 229 and 232 of the Constitution of the State of Alabama, one or both, in that said Act is an arbitrary and unjust distinction between domestic and foreign corporations, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that said Act of the Legislature of Alabama is valid under said provision or provisions of the Constitution of Alabama.

Wherefore, the said Central of Georgia Railway Company, prays that the said Judgment of the Supreme Court of Alabama be reversed.

A. R. LAWTON,
T. M. CUNNINGHAM, JR.,
ROBT. E. STEINER,
Counsel for the Central of Georgia Railway Company, Plaintiff in Error.

Presented with the petition for writ of error and filed this 3rd day of May 1909.

ROBT. F. LIGON,
Clerk of the Supreme Court of Alabama.

84 UNITED STATES OF AMERICA:

To John B. Gaston, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Alabama, wherein the Central of Georgia Railway Company, a corporation, is plaintiff in error

and you are defendant in error, to show cause, if any there be, w
the judgment rendered against the said plaintiff in error, as in
said writ of error mentioned should not be corrected and why spe
justice should not be done in the said petition in that behalf.

Witness, the hand of James R. Dowdell, Chief Justice of the
preme Court of Alabama, this 3d day of May, in the year of
Lord, 1909.

J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama

85 STATE OF ALABAMA,
County of Montgomery:

On this 3rd day of May, 1909, personally appeared Robert
Steiner, before me, a Notary Public, and makes oath that he de
ered a true copy of the within citation to John B. Gaston, defend
in said cause.

ROBT. E. STEINER

Subscribed and sworn to before me this 3rd day of May, 1909

[Seal C. G. Zirkle, Notary Public, Montgomery Co., Ala.]

C. G. ZIRKLE,
Notary Public, Montgomery County, Alabama

UNITED STATES OF AMERICA:

President of the United States to the Honorable the Judges of
Supreme Court of the State of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition
judgment, in a suit which is in the said the Supreme Court
Alabama, before you or some of you, being the highest Court of
and Equity in said State, in which a decision could be had in
suit between the Central of Georgia Railway Company, as Appell
and John B. Gaston, as Appellee, wherein was drawn in question
validity of a statute of said State on the ground of its being repug
to the Constitution of the United States, and the decision was in f
of such validity, and manifest error has happened to the great d
age of the said Central of Georgia Railway Company, as by its c
plaint appears, we, being willing that error, if any hath been, sh
be duly corrected, and full and speedy justice done to the pa
aforesaid in this behalf, do command you, if judgment thereo
given, that then, under your seals, distinctly and openly, you
the record and proceedings aforesaid, with all things concerning
same, to the Supreme Court of the United States, together with
writ, so that you have the same in the Supreme Court at Washing
within thirty days from the date hereof, that, the record and proc
ings aforesaid —, the said Supreme Court may cause fur
86 to be done therein to correct that error what of right and
cording to the laws and customs of the United States sh
be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 3rd day of May, in the year of our Lord, one thousand nine hundred nine.

[Seal of the United States Circuit Court, Middle District of Alabama.]

J. W. DIMMICK,
Clerk of the United States Circuit Court for the Middle District of Alabama.

Allowed by

J. R. DOWDELL,
Chief Justice of the Supreme Court of Alabama.

STATE OF ALABAMA,
County of Montgomery:

On this the 3rd day of May, in the year of our Lord one thousand nine hundred and nine, personally appeared Robert E. Steiner, before me, the subscriber, a Notary Public in and for said State and County, and makes oath that he delivered a true copy of the within writ of error to John B. Gaston.

ROBT. E. STEINER.

Sworn to and subscribed, the 3rd day of May, 1909.

[Seal C. G. Zirkle, Notary Public, Montgomery Co., Ala.]

C. G. ZIRKLE,
Notary Public, Montgomery County, State of Alabama.

87 In the Supreme Court of Alabama

CENTRAL OF GEORGIA RAILWAY COMPANY, Appellant,
vs.
JOHN B. GASTON, Appellee.

I, Robt. F. Ligon, Clerk of the Supreme Court of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby send herewith the record and proceedings in said cause, together with the original writ of error, the original citation and proof of service, and copies of the petition for the writ of error, the order allowing the writ, the assignments of error, the writ of error bond, and certificate of Hon. J. R. Dowdell, Chief Justice of the Supreme Court of Alabama, duly certified and authenticated according to law, to the Honorable the Supreme Court of the United States.

In Testimony Whereof, I have hereunto affixed my official signature as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed, at the Capitol, in

the City of Montgomery, Alabama, on the 8th day of May, in the year of Our Lord, One Thousand, Nine Hundred and Nine.

[Seal Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 21,609. Alabama Supreme Court. Term No. 466. Central of Georgia Railway Company, plaintiff in error, vs. John B. Gaston. Filed May 20th, 1909. File No. 21,690.

Office Supreme Court, U.
FILED.
MAY 15 1909
JAMES H. McKENNEY

IN THE

Supreme Court of the United States

October Term, 1908.

No. [illegible] 450.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

SAMUEL E. GREENE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

The Brown Printing Co., Montgomery, Ala.

IN THE

Supreme Court of the United States

October Term, 1908.

No._____

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

SAMUEL E. GREENE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this case for hearing on the following grounds:

The money sued for in the above entitled cause was collected by the defendant in error, Samuel E. Greene, as Judge of the Probate Court of Jefferson County, in the state of Alabama, as a state and county tax upon the franchise of the plaintiff in error to do business, as a foreign corporation, in the State of Alabama for the year 1908, and is held by the defendant in error, as such Judge of Probate, subject to the decision of this cause, as a part of the revenue of the State of Alabama, and of the County of Montgomery, derived from taxation upon the

franchise of the plaintiff in error to do business as a foreign corporation in said State. The validity of the Act of the Legislature under which said tax was levied and collected is drawn in question in this cause.

Other suits are pending against the defendant in error by foreign corporations doing business in the State of Alabama, and by foreign corporations against Judges of the Probate Courts of other Counties of the State of Alabama, to recover the franchise tax levied and collected from them under said act for the year 1908.

Another suit is pending wherein the plaintiff in error seeks to recover of the defendant in error the franchise tax levied and collected for the year 1909, and other suits will be brought by plaintiff in error against the defendant in error to recover the franchise tax that plaintiff in error may be required to pay while this cause is pending and undetermined, and similar suits will be brought by other foreign corporations doing business in Alabama against defendant in error, and against other Judges of the Probate Courts of the State of Alabama, to recover the franchise tax paid while this cause is pending.

The several sums so sued for are held, and the several sums that will hereafter be so sued for will be held, by defendant in error, and by the other Judges of Probate so sued, as parts of the revenue of the State of Alabama, and of the several Counties in which they are Judges of Probate, until the determination of this cause. And the State of Alabama, and the several Counties claiming said tax, will be deprived of said revenue and the execution of the revenue laws of the State of Alabama thereby stayed, and the governmental operations of the State of Alabama, and of said several counties, embarrassed.

Alexander M. Graham

Attorney General,
and Counsel for Defendant in Error.

Noel L. Woodley

T. Allen

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

No._____

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

SAMUEL E. GREENE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

NOTICE.

To A. P. Humphrey & A. P. Greene, ~~Chisholm & Smith and H. L. Stone~~,

ATTORNEYS FOR THE PLAINTIFF IN ERROR.

Please take notice that we shall make a motion for the defendant in error in the above styled cause before the court at the opening of its session on Monday, May 17th, 1909, or as soon thereafter as Counsel can be heard,

to advance the above styled cause for hearing at such time as the court may direct, and in support of said motion will file and present to the court, on the hearing of said motion, the grounds therefor; a copy of said motion and grounds is herewith served upon you.

Dated May 1st, 1909.

Alexander McGregor

Counsel for Defendant in Error.

Service of the above notice accepted this the first day of May, 1909, and we join in said application and request that the hearing of said cause be advanced.

Counsel for Plaintiff in Error.

Office Supreme Court
FILED
MAY 15 190
JAMES H. McKEN

IN THE

Supreme Court of the United States

October Term, 1908.

No. 451.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

The Brown Printing Co., Montgomery, Ala.

IN THE

Supreme Court of the United States

October Term, 1908.

No._____

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this case for hearing on the following grounds:

The money sued for in the above entitled cause was collected by the defendant in error, John B. Gaston, as Judge of the Probate Court of Montgomery County, in the state of Alabama, as a state and county tax upon the franchise of the plaintiff in error to do business, as a foreign corporation, in the State of Alabama for the year 1908, and is held by the defendant in error, as such Judge of Probate, subject to the decision of this cause, as a part of the revenue of the State of Alabama, and of the County of Montgomery, derived from taxation upon the

BLURRED COPY

franchise of the plaintiff in error to do business as a foreign corporation in said State. The validity of the Act of the Legislature under which said tax was levied and collected is drawn in question in this cause.

Other suits are pending against the defendant in error by foreign corporations doing business in the State of Alabama, and by foreign corporations against Judges of the Probate Courts of other Counties of the State of Alabama, to recover the franchise tax levied and collected from them under said act for the year 1908.

Another suit is pending wherein the plaintiff in error seeks to recover of the defendant in error the franchise tax levied and collected for the year 1909, and other suits will be brought by plaintiff in error against the defendant in error to recover the franchise tax that plaintiff in error may be required to pay while this cause is pending and undetermined, and similar suits will be brought by other foreign corporations doing business in Alabama against defendant in error, and against other Judges of the Probate Courts of the State of Alabama, to recover the franchise tax paid while this cause is pending.

The several sums so sued for are held, and the several sums that will hereafter be so sued for will be held, by defendant in error, and by the other Judges of Probate so sued, as parts of the revenue of the State of Alabama, and of the several Counties in which they are Judges of Probate, until the determination of this cause. And the State of Alabama, and the several Counties claiming said tax, will be deprived of said revenue and the execution of the revenue laws of the State of Alabama thereby stayed, and the governmental operations of the State of Alabama, and of said several counties, embarrassed.

Attorney General,
and Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

No._____

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error.

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

NOTICE.

To GREGORY L. SMITH AND H. L. STONE,
ATTORNEYS FOR THE PLAINTIFF IN ERROR.

Please take notice that we shall make a motion for the defendant in error in the above styled cause before the court at the opening of its session on Monday, May 17th, 1909, or as soon thereafter as Counsel can be heard,

to advance the above styled cause for hearing at such time as the court may direct, and in support of said motion will file and present to the court, on the hearing of said motion, the grounds therefor; a copy of said motion and grounds is herewith served upon you.

Dated May 1st, 1909.

Alexander M Gordon

Counsel for Defendant in Error.

Service of the above notice accepted this the first day of May, 1909, and we join in said application and request that the hearing of said cause be advanced.

Gregory L Smith

H L Stone

Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1908.

No. 451.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,
vs.
JOHN B. GASTON,
Defendant in Error.

Office Supreme Court, U.
FILED.
MAY 17 1909
JAMES H. McKENNE

NO._____.

CENTRAL OF GEORGIA RAILWAY
Plaintiff in Error,
vs.
JOHN B. GASTON,
Defendant in Error.

NO._____.

SEABOARD AIR LINE RAILWAY
Plaintiff in Error,
vs.
JOHN B. GASTON,
Defendant in Error.

NO. 450.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
SAMUEL E. GREENE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, FOR THE DEFENDANTS IN ERROR ON MOTION TO ADVANCE FOR HEARING.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1908.

No._____

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Plaintiff in Error,

vs.

JOHN B. GASTON,

Defendant in Error.

NO._____.

CENTRAL OF GEORGIA RAILWAY

Plaintiff in Error,

vs.

JOHN B. GASTON,

Defendant in Error.

NO._____.

SEABOARD AIR LINE RAILWAY

Plaintiff in Error,

vs.

JOHN B. GASTON,

Defendant in Error.

NO._____.

SOUTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

SAMUEL E. GREENE,

Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, FOR THE DEFENDANTS IN ERROR ON MOTION TO ADVANCE FOR HEARING.

The suits of the Louisville & Nashville Railroad Company vs. John B. Gaston, the Central of Georgia Railway vs. John B. Gaston, and the Seaboard Air Line Railway vs. John B. Gaston were brought by the plaintiffs in error, respectively, the first to recover of the defendant in error as Probate Judge of Montgomery County, Alabama, $23,659.82, the second to recover of the defendant in error $11,371.44, and the third to recover of the defendant in error $1,703.88, which sums were collected by the defendant in error of the plaintiffs in error, respectively, under an Act of the Legislature of Alabama, approved March 7, 1907, as taxes upon the respective franchises of plaintiffs in error to do business as foreign corporations in the State of Alabama.

The suit of Southern Railway Company vs. Sam'l E. Greene was brought by the plaintiff in error to collect of the defendant in error as Probate Judge of Jefferson County, Alabama, the sum of $22,458.36 collected of plaintiff in error by the defendant in error under the said Act of the Legislature of Alabama as a tax upon the franchise of plaintiff in error to do business as a foreign corporation in the State of Alabama. Said act reads as follows:

> AN ACT To provide for the Revenue of the State, by requiring all foreign corporations authorized to

do business in this State under the laws of the State of Alabama, to pay an annual franchise tax.

Section 1. *Be it enacted by the Legislature of Alabama*, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this state, is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in the State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceeds One Thousand Dollars shall pay an annual franchise tax of twenty-five per centum on the first One Hundred Dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of One Hundred Dollars and up to and including One Thousand Dollars, and one-tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over

and above One Thousand Dollars. E. The President, or other executive head, and the Secretary of every foreign corporation subject to a tax under this Act, shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State, if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State, if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such case. F. No foreign corporation which has paid the taxes required under this act shall be required to pay the taxes imposed by Subdi-

vision 24 of Section 4122 of the Code of 1896 as amended by an Act of the General Assembly entitled an Act to further amend the Revenue Laws of the State of Alabama, approved March 5th, 1903. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year as provided by the corporation laws now in force in this State shall be required to pay a franchise tax under this Act before the first day of January, 1908. I. The payment of the franchise tax required by this act, in any one county shall be sufficient, notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Section 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one-half of the amount paid by it to the State; and such amount so received shall be

paid over by the Probate Judge to the County Treasurer for the use of the County."

Plaintiffs in error seek to recover the sums sued for by them respectively of the defendants in error upon the ground that said act under which said tax was levied and collected is invalid, because it is in contravention of the Constitution of the United States.

The three separate suits of the Louisville & Nashville Railroad Company, the Central of Georgia Railway and the Seaboard Air Line Railway were commenced in the city court of Montgomery and the suit of the Southern Railway Company was commenced in the City Court of Birmingham. In each case the defendants demurred to the complaint; the demurrers were sustained and the plaintiffs in error declining to amend their complaints, judgments final were entered for the defendants in error. By the demurrers it was asserted that the act of the Legislature by which the tax is imposed is valid and not in contravention of the Constitution of the United States and the effect of the judgment rendered thereon was to decide that said act is valid.

From these judgments appeals were taken by the plaintiffs in error to the Supreme Court of Alabama, and the judgments of the City Court of Montgomery and the City Court of Birmingham were, by the Supreme Court of Alabama, affirmed; the causes were then brought to this court by writs of error.

The plaintiffs in error seek to hold the defendants in error personally liable and the defendants in error, therefore, withhold from the State of Alabama the said sums of money collected by them respectively under said act of the Legislature as part of its revenue derived from taxation. Plaintiffs in error have brought other suits against the defendants in error to collect the sums paid

by them as taxes levied under said act of the Legislature for the year 1909.

Suits by other foreign corporations are pending against defendants in error and other similar suits are pending against other judges of probate of other counties to recover taxes paid by them under said act.

The State of Alabama and the several counties in which the taxes are paid are deprived and will continue to be deprived of these sums pending this litigation, and its right to collect similar taxes from other foreign corporations will remain unsettled until this suit is determined.

Under Section 949 of United States Compiled Statutes, Act of June 30, 1870, it is insisted that this case should be advanced for hearing in this court upon the grounds set forth in the motion made for that purpose by the defendants in error.

All of which is respectfully submitted.

Alexander McGruder

Attorney General, and
Counsel for Defendants in Error.

Jno. D. Crowley
H. C. McClennin

Jno. D. Crowley

Supreme Court, U. S.
FILED.
JUN 1 1909
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

October Term, 1908.

No. 466.

CENTRAL OF GEORGIA RAILWAY
Plaintiff in Error,

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

The Brown Printing Co., Montgomery, Ala.

IN THE

Supreme Court of the United States

October Term, 1908.

No._____

CENTRAL OF GEORGIA RAILWAY,
Plaintiff in Error,

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

MOTION BY DEFENDANT IN ERROR TO ADVANCE FOR HEARING.

And now comes the defendant in error and moves the court to advance this case for hearing on the following grounds:

The money sued for in the above entitled cause was collected by the defendant in error, John B. Gaston, as Judge of the Probate Court of Montgomery County, in the state of Alabama, as a state and county tax upon the franchise of the plaintiff in error to do business, as a foreign corporation, in the State of Alabama for the year 1908, and is held by the defendant in error, as such Judge of Probate, subject to the decision of this cause, as a part of the revenue of the State of Alabama, and of the County of Montgomery, derived from taxation upon the

franchise of the plaintiff in error to do business as a foreign corporation in said State. The validity of the Act of the Legislature under which said tax was levied and collected is drawn in question in this cause.

Other suits are pending against the defendant in error by foreign corporations doing business in the State of Alabama, and by foreign corporations against Judges of the Probate Courts of other Counties of the State of Alabama, to recover the franchise tax levied and collected from them under said act for the year 1908.

Another suit is pending wherein the plaintiff in error seeks to recover of the defendant in error the franchise tax levied and collected for the year 1909, and other suits will be brought by plaintiff in error against the defendant in error to recover the franchise tax that plaintiff in error may be required to pay while this cause is pending and undetermined, and similar suits will be brought by other foreign corporations doing business in Alabama against defendant in error, and against other Judges of the Probate Courts of the State of Alabama, to recover the franchise tax paid while this cause is pending.

The several sums so sued for are held, and the several sums that will hereafter be so sued for will be held, by defendant in error, and by the other Judges of Probate so sued, as parts of the revenue of the State of Alabama, and of the several Counties in which they are Judges of Probate, until the determination of this cause. And the State of Alabama, and the several Counties claiming said tax, will be deprived of said revenue and the execution of the revenue laws of the State of Alabama thereby stayed, and the governmental operations of the State of Alabama, and of said several counties, embarrassed.

Alexander McCorkle

Attorney General,
and Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

No._____

CENTRAL OF GEORGIA RAILWAY
Plaintiff in Error.

vs.

JOHN B. GASTON,
Defendant in Error.

ERROR TO THE SUPREME COURT OF ALABAMA.

NOTICE.

To ~~GREGORY L. SMITH AND H. B. ~~, ATTORNEYS FOR THE PLAINTIFF IN ERROR.

Please take notice that we shall make a motion for the defendant in error in the above styled cause before the court at the opening of its session on Monday, May 17th, 1909, or as soon thereafter as Counsel can be heard,

to advance the above styled cause for hearing at such time as the court may direct, and in support of said motion will file and present to the court, on the hearing of said motion, the grounds therefor; a copy of said motion and grounds is herewith served upon you.

Dated May 1st, 1909.

Counsel for Defendant in Error.

Service of the above notice accepted this the first day of May, 1909, and we join in said application and request that the hearing of said cause be advanced.

Counsel for Plaintiff in Error.

DEC 1 1909
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 450

Southern Railway Company, . . . *Plaintiff in Error*,

VERSUS

Samuel E. Greene, ... *Defendant in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED P. HUMPHREY,
Of Counsel.

ALFRED P. THOM,
JAMES WEATHERLY,
HUMPHREY & HUMPHREY,
Counsel.

JOHN P. MORTON & COMPANY, INCORPORATED, LOUISVILLE.

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, - - *Plaintiff in Error,*

vs. BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL E. GREENE, PROBATE JUDGE OF JEFFERSON CO., ALABAMA, - *Defendant in Error.*

STATEMENT.

This case comes to this court on writ of error from the Supreme Court of Alabama. The vital question involved is this: Is it competent for a State which has admitted a foreign corporation within its borders and has allowed such foreign corporation to acquire property, to exact of such corporation a tax upon the holding and use of that property when it does not exact any similar tax from a domestic corporation owning and using the same kind of property?

The Legislature of Alabama passed an act which was approved March 7, 1907, entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama to pay an annual franchise tax." This act is printed in the appendix. Under it the Southern Railway Company was required to pay and did pay to Samuel E. Greene, Probate Judge of Jefferson

County, $22,458.36, such payment having been made on February 29, 1908. The Southern Railway Company sued Greene and asked the recovery of this money. The complaint was originally in two counts and a third was afterwards added. Two of these counts asked the recovery of the whole sum. The other (which is the second paragraph in the original complaint) sought the recovery of one third of this amount, $7,486.12. The basis of the recovery of the larger amount is the unconstitutionality of the above entitled act so far as it is made applicable by its terms to the Southern Railway Company. The basis for the recovery of the smaller amount is the claim that if the act were constitutional in so far as the revenue to be derived by the State was concerned it was not constitutional as to the revenue to be derived by the county, upon the ground that the statute was unconstitutional as not embracing the subject of the act in the title. As, however, this last objection was one depending entirely upon State law and was decided against the Southern Railway Company, in the State court, it can not and will not be further urged.

It appears by the complaint that the Southern Railway Company is a corporation created by the State of Virginia, by an Act approved Feb. 20, 1894. A copy of its charter is filed as an exhibit with the complaint (R. 8). It is sufficient to say that it is a railroad corporation and has power to construct, purchase, lease, maintain, and operate railroads not only in Virginia, but in other States of the Union.

The Southern Railway Company, having been duly organized under this act, acquired lines of railroad in Virginia, North Carolina, Tennessee, Georgia, and other States. It began business July 1, 1894, and has ever since continued to carry on the same, such business being acquiring, owning, and operating lines of railroad in various States and conducting an interstate and intrastate transportation of persons and property.

It is enough to say that by the Constitution and laws of Alabama in July, 1894, a foreign corporation could carry on business in that State by (a) filing with the Secretary of State a copy of its charter, (b) paying a maximum fee of $250 and obtaining a license, (c) designating a principal place of business, and (d) an agent upon whom process could be served. These requirements are contained in Sections 1316 to 1324, Ala. Code of 1896, having been brought forward from acts passed in 1887 and 1893.

On July 16, 1894, in pursuance of and in conformity to these laws of the State of Alabama, the Southern Railway Company filed in the office of the Secretary of State a copy of its charter, and at the same time designated its principal place of business in that State and an agent upon whom process could be served, and paid to the Treasurer of the State of Alabama the sum of $250. There is filed with the complaint the receipt of the State Treasurer for this $250, and a certificate showing the filing of a copy of its charter by the Southern Railway

Company, and an instrument in writing designating J. M. Bridges, of Selma, Ala., as the agent of the Southern Railway Company in Alabama (R. 8).

The complaint alleges that as soon as the plaintiff had complied as aforesaid with the laws of Alabama it at once began carrying on in that State the business for which it was chartered, viz., acquiring, owning, and operating railroads both for intrastate and interstate transportation of persons and property, and it is alleged that it has ever since continued to and it is now carrying on such business in Alabama.

The complaint further alleges that between the time that plaintiff thus complied with the laws of the State of Alabama and the year 1899 it purchased and acquired, as permitted and authorized by the laws of Alabama, and there were conveyed to it, various lines of railroad and the franchises under which they had been built and operated, connected with, and continuous of other lines owned by the plaintiff. It is further alleged that these lines of railroad, so far as they were and are situate in the State of Alabama, had been theretofore constructed under its laws by divers corporations either specially chartered by the Legislature of Alabama or organized under its general laws for the incorporation of railroad companies. It is alleged that to set forth the franchises of each of these companies would result in making the complaint greatly prolix, but it is alleged that each of the said Alabama corporations had such powers as are

described in the laws of Alabama in 1886 and in the laws amendatory thereof for the incorporation of railroad companies.

The complaint alleges that since the entrance of the Southern Railway Company into Alabama it has complied with all the laws of that State and has conducted its business—that of a common carrier of persons and property, intrastate and interstate—in due conformity to such laws; that it has been under and has submitted itself to the jurisdiction of the Railroad Commission and the various orders made by that body, and has conformed to the various laws passed by the State of Alabama to regulate the character of business in which it was engaged. It is also alleged that it has from time to time expended large sums of money in betterments upon the property, and has from time to time paid all taxes which have been exacted by the State of Alabama.

Down to the year 1907 the State of Alabama taxed all railroads within its boundaries on an *ad valorem* assessment made by the constituted authorities. Certain other assessments were made by local authorities. Besides that, all railroads paid a certain amount annually for the support of the Railroad Commission. All these taxes were exacted alike of domestic and foreign railroad corporations. The Southern Railway Company paid these taxes upon all of the property alleged in the complaint to have been acquired by it between the years 1894 and 1899, and all of which is particularly described in the complaint.

In the year 1907 the Legislature of the State of Alabama passed an act (see Acts of 1907, page 230, Code 3651) requiring all foreign corporations to take out a license to transact business in the State of Alabama. This license is required to be issued by the Secretary of State and a fee of $10 to be paid therefor. The Southern Railway Company has regarded this as a mere police regulation and has complied with the terms of this law.

In addition to the taxes upon the *ad valorem* assessment, made by the State Board and by the local Boards, in the year 1907, the Legislature of Alabama passed a law requiring all railroads in the State to be taxed upon what is called the "franchise." Under the provisions of this act a railroad, domestic or foreign, makes a certain report to a State board and this board values the entire property of the reporting railroad—real, personal, and mixed—subject to taxation by the State of Alabama. It then deducts from this value so found the assessed value of the tangible property of the company, and the difference is called its franchise. This is subject to the same rate of taxation by the State and, in proportion to mileage, by local municipalities. As stated above, this tax also is levied alike upon all railroad corporations, foreign and domestic.

The particular tax now in controversy is also called a franchise tax, but is levied alone upon foreign corporations. By the terms of this law the corporation is required to make a certain report to a probate judge of

some county where it has a resident agent. This probate judge, from this report, and from such other information as he may desire and obtain, ascertains the value of the capital of the reporting corporation employed in Alabama. The statute requires that there shall be paid to this probate judge 50 cents on the $100 of this value, for the benefit of the State, and 25 cents on the $100 of this value for the benefit of the county whose probate judge determines the value of its capital employed in Alabama. This tax is not levied upon domestic companies. The only similar exaction made of domestic companies is of an annual license fee which is so graded that it can not exceed $500.

Code of 1907, Vol. 1, Sec. 2361, Subdiv. 26.
Code of 1896, Sec. 4122, Subdiv. 55, as amended by Act of 1901, page 222.
Code of 1886, Sec. 629.

In the codes of 1896 and 1886 this last license tax was required alike of all domestic and foreign corporations "not otherwise specifically required to pay a license tax." As a matter of fact, neither foreign nor domestic railroads paid this tax prior to the time when the Code of 1907 went into effect, for the reason that they were alike specifically required to pay the tax imposed for the support of the Railroad Commission.

Code of 1896, Sec. 3489.

This requirement has been omitted from the new Code, and apparently has been repealed. Domestic rail

roads have been required to pay for the year 1908 the proportionate amount of the tax due under Subdivision 26 of Sec. 2361 from June 1, 1908, to January 1, 1909, the former date being the date of the expiration of their license under Sec. 3489.

By Act of February 13, 1893, charter fees were required of all domestic corporations as a condition precedent to the issuance to them of their commissions authorizing them to do business. These fees ranged from $25 to $250.

Code of 1896, Secs. 1287 *et seq.*

A similar exaction is required by the new Code, the fees being at the rate of $1 per $1,000 of capital stock.

Code of 1901, Sec. 3450.

This fee is paid only once.

The Southern Railway Company, under protest, made a report to the defendant, the probate judge of Jefferson County. This report set out the lines of railroad owned by the Southern Railway Company in the State of Alabama and what was the assessed value of the tangible property of these railroads. The probate judge found that the assessed value of these railroads was the value of the capital employed by the Southern Railway Company in Alabama, and assessed and demanded a tax for the State and county together of $22,458.36, of which $7,486.12 was for the benefit of Jefferson County, Alabama. The Southern Railway Company paid this

amount to the probate judge under protest and under duress, accompanying the payment with a warning to the probate judge not to pay over this amount, as the company intended to sue to recover the same from him. Thereupon this suit was brought.

No question is made by the defendant, Greene, of the fact that the money was paid under duress, and no question is made that if Greene had no right to exact this payment of the Southern Railway Company, it is entitled now to recover the same from him. The court of first instance sustained a demurrer to the complaint. On writ of error to the Supreme Court of Alabama the judgment dismissing the complaint was affirmed.

As stated above, the question resolves itself into an inquiry whether the act in controversy is constitutional as applied to the Southern Railway Company. It is insisted that it is not; that the whole act is unconstitutional as denying to the Southern Railway Company the equal protection of the laws as guaranteed under the Fourteenth Amendment to the Constitution of the United States and as impairing the obligation of a contract.

The following is the assignment of errors.

ASSIGNMENTS OF ERROR.

1. The said Supreme Court of Alabama erred in failing to hold that the Act of the Legislature of Alabama, approved March 7, 1907, entitled "An Act to Provide for Revenue of this State by requiring all foreign corpora

tions authorized to do business in this State under the laws of Alabama, to pay an annual franchise tax," was void, because violative of Section 10 of Article I of the Constitution of the United States.

2. The court erred in failing to hold the said Act void as violative of the Fourteenth Amendment of the Constitution of the United States, in that it denies to the plaintiff in error the equal protection of the laws and deprives it of its property without due process of law.

3. The court erred in failing to reverse the judgment of the City Court of Birmingham, with directions to enter a judgment in favor of the plaintiff in error against the defendant in error in the amount sued for.

4. The court erred in other respects.

ARGUMENT.

The Southern Railway Company is a "person," within the meaning of the Fourteenth Amendment. That a corporation is a "person," within the meaning of the Fourteenth Amendment, Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, is an authority directly in point.

We further submit that the Southern Railway Company is a person, "within the jurisdiction" of the State of Alabama. As stated above, the State of Alabama provided how foreign corporations could be admitted within its jurisdiction for the purpose of transacting business. These requirements embraced a payment of a certain license fee, the obtaining of a license from the proper State authority, the designation of a principal place of business in the State, and the name of an agent upon whom process could be served.

In Blake v. McClung, 172 U. S. 239, this court had occasion to consider the meaning of this language, "within its jurisdiction," as contained in the Fourteenth Amendment, in the sentence, "deny to any person within its jurisdiction the equal protection of the laws." In that case it appeared that a certain corporation organized under the laws of Great Britain and Ireland had registered its charter under the provisions of a certain Tennessee statute and established a manager's office in the State, where it purchased property and did a mining and manufacturing business. This company failed, and

there was a suit to wind it up and distribute its assets. Under laws of Tennessee it was provided that in such a case Tennessee creditors should be preferred. It was held that this was invalid as to individuals, citizens of Ohio, but was valid as to a Virginia corporation creditor of the insolvent corporation.

In reference to the rights of the Virginia corporation the court, after holding that it could not invoke the protection of the second section of Article 4 of the Constitution, because not a citizen within the meaning of that section, further held that it was not deprived of its claim, but was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets; therefore that if the State court erred in its decree in reference to the Virginia corporation, such corporation could not be said to have been deprived of its property without due process of law, within the meaning of the Constitution. The court proceeded:

> "It is equally clear that the Virginia corporation can not rely upon the clause declaring that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the State of equal protection to persons 'within its jurisdiction.' Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court

can not assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted, the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the amendment, simply by presenting its claim in the State court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the State of Tennessee (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute) to the claims against the latter corporation of creditors residing in Tennessee, is not

> a denial of the 'equal protection of the laws' secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed."

It is also to be noted that this tax is by the terms of the act laid alone on foreign corporations having authority to transact business in Alabama under its laws.

The Southern Railway Company, having thus become a person, within the jurisdiction of the State of Alabama, proceeded, as alleged in the complaint, to carry on in Alabama the business for which it was chartered, viz., acquiring, owning, and operating railroads both for interstate and intrastate transportation of persons and property.

The plaintiff makes the following allegation:

> "Plaintiff states that between the time that it thus complied with the laws of the State of Alabama and the year 1899 it purchased and acquired, as permitted and authorized by the laws of Alabama, and there were conveyed to it, various lines of railroad and the franchises under which they had been built and operated, connected with, and continuous of other lines owned by plaintiff."

The plaintiff alleges that these lines had been constructed by corporations organized under the laws of Alabama having the general powers of railroad corporations, and the complaint described those lines. They are the same exactly as those which the probate judge took into consideration in fixing and determining the

value of the capital of the Southern Railway Company employed in the State of Alabama.

Without reciting any other enactments of the State of Alabama, it is sufficient to refer to an act approved February 11, 1891, entitled, "An Act to amend Section 1586 of the Code." (See Acts 1890-91, page 568.) By this act it was provided as follows:

> "SECTION 1. Be it enacted by the General Assembly of Alabama, That Section 1586 of the Code of Alabama be and the same is hereby amended so as to read as follows:
>
> "1586 (2011). Aid to, or purchase and lease of other roads. A corporation chartered under the laws of this or any other State, heretofore or hereafter created, for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation organized in pursuance of the laws of this or any other State may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease, or arrangement

perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof, at such time and place, and in such manner, as they shall designate; and the holders of a majority in value of the stock (of) such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

This act was carried into the Code of 1896 as Section 1170, which section is as follows:

"1170 (1896) (2011). Aid to, or purchase and lease of other roads. A corporation chartered under the laws of this or any other State heretofore or hereafter created for the purpose of building, constructing, or operating a railroad, may, at any time, by means of subscription to the capital stock of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of the laws of this or any other State, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of such corporations or com

> panies has been called by the directors thereof, at such time and place, and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto."

It is true that there is no allegation in the complaint that these purchases were made with the assent of the stockholders of the purchasing and purchased roads. This, we submit, is immaterial. In Louisville & Nashville Railroad Company v. State, 45 Southern, 296, there was a *quo warranto* against the Louisville & Nashville Railroad Company, and it was claimed that the defendant company should be ousted of the title and possession of the South & North Alabama Railroad Company. It did not appear in the pleas of the Louisville & Nashville Railroad Company, setting up the acquisition of its property, that there had been a meeting of the stockholders called by the directors as required by Section 1170. The Supreme Court of Alabama, however, said:

> "It is further contended by counsel for the appellee that the holders of a majority in value of the stock of the South & North Alabama Railroad Company have not assented to the arrangement entered into by the two railroads at a meeting of the stockholders called by the directors as required by Section 1170. This is true, but this provision is not contained in Section 1171, and it seems that the relations existing between these companies at the time of the enactment of this section of our statutes receives ample recognition therein as a valid arrange

ment. However this may be, the objection that the assent of the stockholders prescribed in Section 1170 was not given can not be raised by the State in this proceeding. The State would, of course, protect a stockholder through its judicial machinery against the consequences of a disregard of this condition if timely objection were made in a proper manner. But the State itself is not interested on its own behalf in having the prescribed meeting of the stockholders called. The provision was clearly intended especially for the benefit of the stockholders, who may waive compliance therewith, and who only may raise the objection of non-compliance. The formalities prescribed for the valid execution of a conveyance of property by a corporation are for the benefit of the shareholders of the company, and if they acquiesce, others can not complain. West Point M. Co. v. Allen, 143 Ala. 547, 39 South. 351, 111 Am. St. Rep. 60."

It will be observed that this was the case of a direct attack by the State upon the title of the Louisville & Nashville Railroad to the property in question. In the case at bar it appears that the probate judge, in fixing the amount of the capital employed by the Southern Railway Company in Alabama, has included certain specific lines of railroad, which lines of railroad, it is alleged in the complaint, were acquired by the Southern Railway Company between the years 1894 and 1899. It is difficult for us to understand how the State can on the one hand use the ownership of this property as the basis of this tax, and then, when the matter comes into litigation, set up any infirmity of title of the Southern

Railway Company to this property. If the Southern Railway Company did not own this property, then certainly the State of Alabama had no right, under the terms of the act under discussion, to require it to pay any taxes based upon its value. Surely it will not be contended that the State of Alabama can make the Southern Railway Company pay a tax based on property which the State of Alabama is claiming that the Southern Railway Company does not own.

The question of the title to property acquired by a corporation is something with which an assessing officer has nothing to do. If the State wishes to attack this title, it must be done in a proceeding designed to that end.

Commonwealth v. Ingalls, 121 Ky. 194.

Counsel for the State call attention to the fact that this statute uses the word "railroad," and seem to argue from this that the State of Alabama did not mean that the franchise belonging to and attendant upon the railroad company which constructed the railroad should pass under the sale. This we respectfully submit is a very narrow construction of the word "railroad," as used in this section. It is obvious, we think, that it meant not only the right of way, track, depots, and depot grounds, but also the franchises which are attendant upon and made valuable by this physical property.

In Gibbs v. Drew, 16 Fla. 147, 26 A. R. 702, it is said:

> "Our conclusion is that a railroad is a public work, the possession of which is attended with the right and duty to use and employ the franchises granted by the sovereign in connection with and as appurtenant to it."

So in M., K. & T. v. Elliott, 102 F. R. 96, 106, the court says:

> "A railroad track is of no use to its owner or the public unless cars are run upon it. The railroad is built for that purpose. It is the movement of the trains upon the track that constitutes it a railroad. This is the consummation of the whole business."

At this point we again call attention to the fact that under the laws of the State of Alabama tangible property of all railroad companies is assessed by a State Board of Assessment, composed of the Governor, Secretary of State, Auditor and Treasurer (Code, 1907, Sections 2133-2145). A further provision of the statutes (Sections 2364-2390) is to the effect that every railroad company shall make a full and comprehensive report to the State Tax Commission of Alabama so that it may ascertain the value of the franchises or intangible property and assets of such railroads. This is entitled, in the Political Code (Article 19, page 976), the franchise tax of common carriers. The value of all of the property and franchises of the railroad company is ascertained by this Tax Commission, and from such value is deducted the value of the tangible property, and the remainder is

declared to be the true value, for taxation, of the franchise or intangible property of the railroad.

It is alleged in the complaint (R. 4) that the plaintiff has paid the *ad valorem* taxes and also these franchise taxes. It is obvious, therefore, that the State of Alabama has, in valuing the property of the Southern Railway for this so-called franchise tax, taken into consideration the totality of value of the property of the corporation as added to by the possession and exercise of its franchise.

It is also argued that the plaintiff in this case fails to allege that the Southern Railway Company bought these Alabama railroads from the corporations which actually constructed them, it being asserted that the language of the complaint is not inconsistent with the fact that the railroads might have been constructed by one Alabama company and then sold to another Alabama company and then bought by the Southern Railway Company. But we respectfully submit that there is nothing in the language of the section which can be construed as conveying the idea that only the company which actually did the constructing can sell its property, nor is there any reason which we can imagine that would induce the Legislature of Alabama to allow a corporation to sell a railroad which it had constructed and not sell a railroad which it had bought.

Again, we think this argument is answered by the authorities cited above, to the effect that the State of

Alabama can not tax the Southern Railway Company upon property when it is denying that the Southern Railway Company owns the property.

It is to be noted that the Supreme Court of Alabama did not rest its decision in this case upon any of these contentions.

We pass by, then, this suggestion and assume, for the purposes of our present discussion, that the Southern Railway Company complied with the laws of the State of Alabama and under its invitation became a person within its jurisdiction, and between the years 1894 and 1899 purchased the railroads set out in the complaint under the authority of Section 1170 of the Code of 1896. Under these circumstances it is to be inquired whether the State of Alabama can exact a tax from the Southern Railway Company by reason of its ownership of this property when it does not exact a similar tax from domestic corporations owning similar property. We have mentioned the dates—1894 and 1899—because, for the purposes of our present discussion, we desire to call the court's attention to the fact that all the property of the Southern Railway Company which is made the basis of the disputed tax was acquired prior to 1901, the date of the adoption of the present Constitution of the State of Alabama. In other words, this is not a case where the Southern Railway Company has either entered the State of Alabama or purchased property in the State of Alabama subsequent to the adoption of the Constitution of

1901, which Constitution contains Section 229, requiring the Legislature to exact a certain tax from domestic corporations, and Section 232, requiring the Legislature to exact a certain tax from foreign corporations.

Sections 229 and 232 of the Constitution of 1901 are as follows:

> "Section 229. The Legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the Legislature; and shall pass general laws under which charters may be altered or amended. The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws."
>
> "Section 232. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the State. The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital em

ployed in this State. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

If an act of the Legislature exacting this tax from foreign corporations and not from domestic corporations is invalid as denying to the foreign corporation (a person, within the jurisdiction of the State of Alabama) the equal protection of the laws, it is not helped out at all by being enacted in pursuance of the Constitution of the State of Alabama, adopted since the Southern Railway Company became a person, within the jurisdiction of the State of Alabama, and acquired all the property sought to be taxed or made the measure of the tax. The provisions of a State Constitution, just as much as the provisions of an act of the Legislature of a State, are invalid if contrary to the Constitution or laws of the United States. This, we submit, is a truism which need hardly be stated.

We do not mean to intimate that even if the Southern Railway Company had acquired its properties after 1901 this tax would be valid. We are simply addressing ourselves to the exact facts of the case.

We come, then, to consider the vital question in this part of our argument: What right has a foreign corporation which has come within the jurisdiction of a State to the equal protection of its laws? It is perfectly obvious that to tax the same kind of property in a substantially different way simply because that property is

owned by different persons is a denial of the equal protection of the laws. A railroad may be owned and operated by a foreign corporation or a domestic corporation. To allow an exaction upon the property of a railroad company because the title to that property is in a foreign corporation is to take away from that foreign corporation the equal protection of the laws if a substantially similar burden is not laid upon a domestic corporation of the same character and owning the same kind of property. As has been said by this court many times, the "equal protection of the laws" means "the protection of equal laws."

There are many cases in this court which consider the right of a State to deal with foreign corporations. It is not at all necessary to consider elaborately these cases.

In Paul v. Virginia, 8 Wall. 168, it was held that as an insurance company was not engaged in interstate commerce, no foreign insurance company could carry on business in a State, except by the permission of such State; that the State, having the right to exclude absolutely such foreign insurance corporation, could fix its own terms upon its admission into the privilege of doing business within its boundaries.

Security Mutual Company v. Prewitt, 202 U. S. 246, reviews the cases on this subject and holds that as a State can prohibit an insurance company from coming within its borders to carry on its business, it can revoke its license, because the foreign corporation exercises the

right of removal of a case from the State to the Federal court. In other words, in that case the court said:

> "As a State has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

Other cases considering this subject are:

> Ducat v. Chicago, 10 Wall. 410.
> Philadelphia Fire Ass'n v. New York, 119 U. S. 110.
> Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.
> Hooper v. California, 155 U. S. 648.

On the other hand, this court has been called on to consider the right of a foreign corporation engaged in interstate commerce to enter a State for the purpose of carrying on such interstate commerce, and has held that it has the right so to do. The following are illustrative cases of this line of decision:

> Pensacola Tel. Co. v. West. Tel. Co., 96 U. S. 1.
> P. S. S. Co. v. Pennsylvania, 122 U. S. 326.
> Leloup v. Port of Mobile, 127 U. S. 641.
> McCall v. California, 136 U. S. 104.
> N. & W. R. R. Co. v. Pennsylvania, 136 U. S. 114.
> Crutcher v. Kentucky, 141 U. S. 47.

So this court has held that a corporation carrying on in a State both interstate and intrastate business may be taxed by the State upon its intrastate business.

Osborne v. Florida, 164 U. S. 650.
Pullman Co. v. Adams, 189 U. S. 420.

We do not pretend that we have given an exhaustive statement of all cases upon the different phases of this subject, but have cited the above as sufficiently establishing the principles which we have above outlined. We have, however, a different case from any of these. All the cases which we have cited above are concerned with the right of a corporation to carry on business within a State where it was not incorporated. The case in hand, however, is that of a corporation which, complying with the laws of a State foreign to its origin, has, under the sanctity of the laws of that State, purchased a particular kind of property which is valuable only if employed in a particular way.

In Ames v. Union Pacific R'y Co., 64 F. R. 177, the court said:

> "It must always be borne in mind that property put into railroad transportation is put there permanently. It can not be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value. The authorities on these general propositions are collected in the opinion in the recent case of Reagan

v. Trust Co., supra, and I need not do more than refer to that case."

The power to tax, it has been often said, is the power to destroy. If, therefore, it is competent for the State of Alabama to deal with the property of the Southern Railway Company, viz., the lines of road acquired by it within the State of Alabama, as it could do with the business of a foreign insurance company, if there is no distinction between the two cases, then it would be competent for the State of Alabama, without any reason whatever, to pass an act to the effect that no foreign corporation should, after the date of the enactment of such law, use any railroad owned by it in Alabama for the purpose of intrastate commerce. It need not simply deprive the foreign corporation of a part of the value of its property by requiring it to pay a tax upon it, but it could, at one stroke, entirely destroy such value so far as that value was dependent upon its use in intra state transportation.

The State of Alabama has either an absolute right to control the use by the Southern Railway Company of its railroad property in Alabama or there is some limitation upon the right of the State of Alabama to do this. If the position of the Southern Railway Company in Alabama is simply that of an insurance company, then it can be expelled from the State without any reason whatever for such expulsion being given, or for a bad reason as well as for a good reason.

We suppose that it will be admitted (and the act in controversy seems to admit this) that the Southern Railway Company can refuse to pay its tax and still continue to carry on interstate commerce; but if it refuses to pay this tax, it is visited, under the terms of the act, with the following penalty:

> "No foreign corporation required to pay a tax under this act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts in this State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due."

It has been argued in this case that although this penalty may be unconstitutional, yet this does not render the act void, and the State, it is said, can maintain an action of assumpsit for the amount of this tax. But the State will continue to tax the property and franchises of the corporation just as before. This suggestion, we therefore submit, does not at all relieve the situation. The question must recur—What, if any, are the limitations upon the power of the State of Alabama to deal with the ownership by the Southern Railway Company of its railroad property acquired in Alabama by virtue and in pursuance of its laws? The Southern Railway Company does not owe its right "to be" to the State of Alabama, nor does it owe its right to purchase railroads in Alabama solely to Alabama. It acquired this right

from the State which created it—the State of Virginia, but the State of Alabama, having chartered certain companies and authorized them to build, maintain, and operate railroads in Alabama, authorized these corporations to sell and the Southern Railway Company to buy these properties. It will not be denied that a most material part of the value of these properties consists in their ability to carry persons and property from one point in Alabama to another point in Alabama. Whether the capacity of a railroad company in Alabama to conduct an interstate commerce or an intrastate commerce is of equal value the one to the other, or of more value, the one than the other, it will not be disputed that each is in itself a most material element of value. If the State of Alabama can exact of the Southern Railway Company this tax for the right to use these railroads in intrastate commerce, then it can exact twice this amount or any multiple thereof. It can claim the whole proceeds which it may derive from its intrastate commerce. We know that it is sometimes a weak and fallacious process of reasoning to argue against the existence of a power because of an imaginary abuse of such power; but it is everywhere recognized that an inequality of public burdens not based upon reasonable classification is a denial to the disfavored person of the equal protection of the laws.

This court has held that this is true where such discrimination is made, not by a State Legislature, but by the conduct of assessing officers.

Raymond v. Chicago Union Traction Company,
207 U. S. 20.

In Connolly v. Union Sewer Pipe Co., 184 U. S. 560, this court laid down the rule as to classification in legislation:

> "The difficulty is not met by saying that, generally speaking, the State, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

We have found only five cases involving the rights of a foreign corporation which has, by permission of a

State, come within its jurisdiction and there acquired property. These are:

Erie Railroad v. Pennsylvania, 153 U. S. 628.
Commonwealth v. Mobile & Ohio R. R. Co. (Court of Appeals of Kentucky), 64 S. W. 451.
American Smelting Co. v. Colorado, 204 U. S. 103.
Seaboard Air Line v. Railroad Commission of Alabama, 155 F. R. 792.
Chicago R'y Co. v. Ludwig, 156 F. R. 152.

In the first of these cases a foreign railroad company was allowed to build a part of its line across the State of Pennsylvania. The same was true of the case of Commonwealth v. Mobile & Ohio R. R., where the Mobile & Ohio Railroad was authorized by the Legislature of the State of Kentucky to build its road across that State.

American Smelting Co. v. Colorado, 204 U. S. 103, is a case where a smelting company was allowed to enter the State of Colorado and construct a plant.

In the other two cases foreign railroad companies were authorized to buy lines of railroad within a State and an effort was subsequently made to prohibit them from removing cases from the State to the Federal court, under penalties.

It must be admitted that each of these cases has, in the opinion of the court, certain elements of contract, and it may be said that in each case the effort of the State to pass discriminatory legislation is held invalid as impairing the obligation of a contract. It must be

admitted that the sections in the Alabama Code, which we have quoted as authorizing the Southern Railway Company to buy lines of railroad in Alabama, have no express provision as to the terms upon which such railroads shall be held after their purchase. We respectfully submit, however, that this is a distinction without a difference. When the State of Alabama authorized the Southern Railway Company to come within its jurisdiction, submit to its laws, designate a principal place of business and an agent upon whom process could be served, and when, under the express authority given to it by the State of Alabama, the Southern Railway Company bought railroad property in Alabama, it acquired the right to hold and use that property with no greater power remaining in the State of Alabama in regard to such ownership and use than the State of Alabama would have had if the purchased railroads had remained the property of their original owners, corporations created by the State of Alabama. In other words, the State of Alabama having authorized the Southern Railway Company to buy this property, retained no greater power over this property, no greater control over it, and no greater right of tax exactions over it, than if such authorized purchase had not been made. Without express language, we have here every essential element of a contract.

The State of Alabama granted the right to these Alabama corporations to acquire the right of way, depot properties, and other real and personal property neces-

sary for the construction and operation of a railroad line. It also granted to these Alabama corporations the right to use this property so acquired in a particular way—indeed, in the only way in which a valuable use could be made of it. This property as a unit—this road-bed, depot grounds, real and personal property, and all franchises to use the aggregate in a particular way—passed to the Southern, the purchase having been made by the express assent of the State of Alabama.

The only value of the property which the Southern has acquired under the permission of the State of Alabama is in its use for the transportation of persons and property, part of such transportation and therefore part of such use and value being interstate and the other part intrastate. It is, however, claimed that it is competent for the State of Alabama to amend or repeal the charters of these various corporations whose rights, properties, and franchises the Southern has acquired; but it does not follow that such right of amendment or repeal proves the validity of the tax legislation now under considera tion. There are two reasons for this. The first is that the State of Alabama has not attempted to exercise this right to amend or repeal. There is nothing in this stat ute evidencing the purpose of the State of Alabama to amend or repeal the charters of these Alabama corpora-tions. Not a word is said in this act in reference to such amendment or repeal; nor does the title of the act evi dence any such purpose. It was not in the mind of the Legislature to make such amendment or repeal.

But again, the Constitution of Alabama, in permitting the amendment or repeal of charters, limits such right to those acts which will not do injustice to the stockholders. There is not, therefore, a broad and unlimited right of amendment or repeal.

It will hardly be claimed that an amendment to the charter of an Alabama corporation which exacts a discriminatory tax for the user of its property is just to its stockholders. Such an amendment does not have for its purpose the police regulation of the corporation, but is a lessening of the value of its property by the amount exacted on the part of the State when such contribution is not asked for from the owners of similar property similarly used.

But to say that this is an amendment to the charters of the companies whose property and franchises were purchased by the Southern Railway Company and other foreign companies in no way advances the argument. Obviously the Legislature could not pick out one, two, or three corporations and, in the guise of an amendment, fix burdens upon those companies from which all similar companies were free. If to subject a few corporations of a class to an unequal burden deprives such corporations of the protection of equal laws, the Constitution can not be evaded by calling on a power to amend the charters of such corporations. For this power to amend is itself as much subject as any other power to constitutional restraint.

In American Smelting Co. v. Colorado, 204 U. S. 114, it is said:

> "Nor is this a case where the power given by the State Constitution to the General Assembly to alter, amend, or annual a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the State."

All this, however, seems to us to be beside the mark, for here is no effort to amend or repeal. Here is an effort to exact a discriminatory tax, unequal and unjust, upon the use of property, predicated alone upon the character of its owner. In any view, we submit, this is beyond the power of the Legislature of Alabama, and this act is therefore void.

There have been filed in the State and Federal courts many cases challenging rates of fare and freight made by State Legislatures and State Commissions. These rates of course were solely for intrastate transportation. These suits, however, have been brought indiscriminately by foreign as well as domestic corporations. No distinction has ever been attempted between the two classes in such cases, nor has any relief ever been given to one class that has not been likewise given to the other.

In the case of Smyth v. Ames, 169 U. S. 466, it was decided that the State of Nebraska could not fix its rates of intrastate transportation lower than would be sufficient to make a reasonable return upon the property of

the railroad companies employed in intrastate transportation, and could not ask railroads running through that State to advance their interstate rates so as to yield a fair return not only on property employed in interstate, but also employed in intrastate transportation.

We submit that it is impossible to justify these cases allowing this relief to foreign corporations if it be true that it is competent for the State of Alabama to deal with foreign corporations owning railroads in Alabama as it may deal with such foreign corporations as insurance companies simply carrying on business in the State. In other words, the State of Alabama can not, in dealing with the Southern Railway Company as to railroads owned by it within the State of Alabama, apply any such principle as that having the power to exclude, it has the power not only to fix any conditions upon the entering of the corporation into the State but also upon the continuance of the corporation in the State. If the State of Alabama can not cut half in two the rates charged by the Southern Railway Company for intrastate transportation, how can it make it a condition of the Southern Railway Company's continuing its intrastate business, that it shall pay half what it receives from this part of its business into the State Treasury? Exactly the same result is reached by either process—we mean practical result to the Railway Company. We say this because it is not material to the Railway Company whether the amount going into its treasury shall be cut

half in two or shall remain the same and one half be seized by the State.

This but brings us around again to the proposition that the power which a State has of excluding a foreign corporation from a further conduct of business within the State is not without limit in the case of such corporations as are here involved. We do not believe it is without limit as to any corporation. Thus there is nothing in the books which we have seen that would justify the Legislature in providing not only that a foreign corporation heretofore carrying on the business of life or fire insurance should cease to carry on such business, but also that contracts it had made prior to the date of its expulsion should not be enforced.

In the case at bar, however, the Southern Railway Company, as we have stated with, we fear, unpardonable reiteration, upon invitation of the State of Alabama and in compliance with all of its laws, purchased property in Alabama which is only valuable if used in a particular way. If the Southern Railway Company shall cease to use the railroads owned by it in the State of Alabama, the right of way of such railroads will revert to the former owners. In other words, the property is not only diminished in value by the failure to use it, not only owes its whole value to its user, but is of a kind which absolutely perishes by non-user.

We have found no case holding that a State can, in making exactions from corporations, distinguish between

domestic and foreign corporations except in the instance of the admission of foreign corporations and where the character of the business and the property of the foreign corporation are such that the State has power to exclude it absolutely. But that a State can tax the property of a foreign corporation at one rate and a domestic corporation at another rate—this is a proposition which we do not believe can be sustained either in law or morals. Nor yet has any case decided that a State can, after permitting a corporation to acquire property, put on that property an unequal burden. There is no valid distinction between property acquired from a State and property acquired by permission of a State. Alabama could not grant land and then tax that land while it let all other land go free. So Alabama can not permit a foreign corporation to submit to its jurisdiction and to acquire land from its citizens and then tax that land while all other land is free.

The Supreme Court of Alabama, Judge Simpson delivering the opinion of the court, after stating the nature of the controversy and discussing the character of the tax, proceeds as follows:

> "So the question arises, can the State, after a foreign corporation has complied with previous laws, so as to be licensed to do business in the State as a corporation, has paid all annual licenses required, and has paid all taxes on property required of corporations, including a franchise tax, still require it to pay a large additional amount as a franchise tax, which is levied on foreign corporations alone?

"The statement of this proposition would furnish its own answer if the question arose between two individuals, residents of the State. The next inquiry, therefore, is whether there is anything in the nature, position, and standing of a foreign corporation which makes such a discrimination valid.

"It is familiar law that a State may allow a foreign corporation to transact business, within its limits, on such terms as it may please, or may exclude it entirely. The license, in the absence of special terms, is a mere revocable one, which may be recalled or burdened with additional restrictions provided the Constitution of the United States is not violated. Doyle v. Continental Ins. Co., 94 U. S. 535, 541, and cases cited; Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 620; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 249.

"Under the foregoing and other authorities the law in question is not violative of the clause in our constitution, nor of that in the United States Constitution, in regard to the impairing of the obligations of a contract, unless there are some special features connected with the granting of license to this corporation which differentiate it from the ordinary case of a license granted to a corporation.

"Section 1169 of the Code of 1896, under which the purchases in this case were made, provides that 'such railroad so purchased shall be, in all respects, subject to the laws of this State, as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved.'

"A statute of Colorado prescribing certain conditions necessary for a foreign corporation to enter the State, concluded with these words: 'and such corporation shall be subjected to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character, organized under

the general laws of this State, and shall have no other or greater powers.'

"After the corporation in question had complied with the provisions of the then law, and had invested a considerable amount in its business in said State, the Legislature passed an act placing upon domestic corporations a tax of two cents upon each thousand dollars of capital stock, and upon foreign corporations a tax of four cents on each thousand dollars of capital stock.

"The Supreme Court of the United States held this act to be violative of the constitutional clause prohibiting any law impairing the obligation of a contract, the court saying: 'These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were, or thereafter might be, imposed upon domestic corporations of like character.' The court also says: 'Nor is this a case where the power given by the State Constitution to the General Assembly, to alter, amend or annual a charter, is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the State.' American Smelting Co. v. Colorado, 204 U. S. 103, 112, 113, 114, 115.

"In a previous decision of that high court, written by the same Justice, it was held that a provision in the California Water Act of 1862, prohibiting county boards from reducing water rates below a certain point, did not create, with corporations thereafter incorporated, a contract which the State was

bound by in subsequent legislation, and that the State could reduce the rates below that point without violating the contract clause of the Constitution. A number of cases are reviewed and analyzed in the opinion, and while the court holds that this power to amend is not without limit, even when reserved in the Constitution of the State, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration, yet 'a mere reduction of rates, while still leaving reasonable and fair compensation for the use of the property, is not prohibited.' Stanislaus Co. v. San Joaquin C. & I. Co., 192 U. S. 201, 213. See also Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 383, 386, 387.

"It will be noticed that in the Smelting Company case the provision defining the status of the corporation was in the act providing for the entry of the corporation into the State, so that when the corporation complied with the terms, paid the entrance fee and received its certificate, the contract was formed; while in the case now under consideration there were no such provisions in the statute under which the corporation entered the State, but only in the statute which authorized it to purchase the property of domestic corporations, and the claim of the appellant is that the general law of the State is incorporated into the contract between it and the selling corporation. It will be noticed also that Section 1169 of the Code of 1896 does not say anything about what shall be the status or rights of the purchasing corporation, but only that 'such railroad so purchased shall be in all respects subject to the laws of the State,' etc.

"Section 23 of Article I of the Constitution of 1875 prohibited the State from making any 'irrevocable grants of special privileges or immunities,' and this was as much a part of the contract of purchase

of the railroad property as was Section 1169 of the Code of 1896.

"We hold, then, that the act complained of is not violative of said section of the Constitution of 1875, nor of Section 10 of Article I of the Constitution of the United States.

"The only effect of the act complained of is to recall or revoke so much of the privilege granted as authorized the foreign corporation to do an intra state business. The corporation remains the same, and the railroad the same, and the pleadings in this case do not raise any issue as to the result of the tax's working 'oppression and wrong.'

"The fact that Section 242 of the Constitution places certain duties on railroad companies, has no bearing on this question, for if the State itself prohibits the corporation from doing intrastate business it could not be subjected to liability for not doing it.

"The act does not interfere with the interstate business of the railroad company, and there is nothing in the pleading to raise the question that the enforcement of the statute would interfere with the interstate business. Therefore, the act is not invalid on that account. Osborne v. Florida, 164 U. S. 650.

"The next instance of the appellant is that the act complained of is violative of that provision of the Fourteenth Amendment to the Constitution of the United States, which provides that 'no State shall * * * deny to any person within its jurisdiction the equal protection of the laws.'

"It is settled by the decisions of the Supreme Court of the United States that while a corporation is not a 'citizen,' within the meaning of that instrument, yet it is a 'person,' within its terms.

"There can not be any controversy as to the point that a corporation of another State, which has complied with the laws of this State, so that process can

be served upon it, and paid the fees required for the privilege of doing business in this State, and also purchased property in the State and entered upon the transaction of the business authorized, is 'within' the 'jurisdiction' of the State. Blake v. McClung, 172 U. S. 239. In fact, the claim of the State to impose a tax on the corporation carries with it an admission that it is within the jurisdiction of the State.

"In a case where a State Board of Equalization assessed the franchise and other property of a corporation, at a different rate and by different methods, so as to result in 'an enormous disparity and discrimination between the various assessments on corporations,' it was held to be a violation of the Fourteenth Amendment. Raymond v. Chicago Traction Co., 207 U. S. 20, 37, 38.

"An act regulating the charges in stock yards of certain size was held to be violative of the Fourteenth Amendment because there was only one stock yard of that size in the State, the court saying: 'While recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business, and under the same conditions, burdens are cast which are not cast upon the other. Cotting v. Kansas City, etc., Co. & Kansas, 183 U. S. 79.

"In another case deciding that the State has a right to fix conditions upon which a corporation may do business in the State, and holding that a corporation is not a citizen, the court says that the object of the Fourteenth Amendment is 'to prevent any

person or class of persons from being singled out as a special subject of discrimination and hostile legislation. Under the designation of *person* there is no doubt that a private corporation is included. * * * The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State.' Pembina M. Co. v. Pennsylvania, 125 U. S. 181, 188, 189.

"In another case, while sustaining the right of the State, as a purely police regulation, to prohibit laundry work in certain localities, the court, commenting on the Fourteenth Amendment, said, among other things, that it requires 'that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.' Barrier v. Connally, 113 U. S. 27, 31; Bell's Gap R. Co. v. Penna., 134 U. S. 238; Gray's Limitations of Taxing Power, Secs. 1114, 1115.

"The Supreme Court of Kentucky, while holding that a corporation is not a 'citizen' and may have imposed upon it such conditions as the State may choose to require, yet said: 'If any State * * * should allow a corporation of another State to transact business as a corporation within its limits, and to acquire property there, the rights and property thus legally acquired, being held by the corporators, may be entitled to the same protection, under this clause of the Constitution, as if held by the corporators themselves.' Commonwealth v. Milton (12 B. Mon. 212), 54 Am. Dec. 522, 529, 530.

"On the other hand, the Supreme Court of Iowa sustains the right of a State to impose a higher tax on foreign corporations than is imposed on domestic corporations, basing its conclusions partly on the

general principle that the State has absolute power over foreign corporations, and partly on a misunderstanding to the effect that in the Pembina Case (125 U. S. 180) the Supreme Court of the United States had held that a corporation is not a 'person,' when in fact the decision in that case is that although a corporation is not a 'citizen,' it is a 'person' (Op. 189). Scottish, etc., Ins. Co. v. Herriott (109 Iowa, 606), 77 Am. St. 548, 555.

"The case of Paul v. Virginia, 8 Wall. 168, which is frequently referred to in the decisions, came up on an application for a license, and was based on the principle that a corporation is not a citizen.

"The Supreme Court of Illinois held that the State may rightfully discriminate against a foreign insurance company in levying taxes (Ducat v. City of Chicago, 48 Ill. 172), and that decision was affirmed by the Supreme Court of the United States (Ducat v. Chicago, 10 Wall. 410). It is true that this decision rests upon other provisions of the United States Constitution relating to 'citizens,' and no mention is made of the Fourteenth Amendment, yet said Fourteenth Amendment was then in force.

"The Supreme Court of California held that after a foreign corporation was permitted to do business in that State, the State could not impose upon it conditions not imposed upon citizens under the uniformity clause of the California statute. San Francisco v. Liverpool, etc., Ins. Co. (74 Cal. 113), 5 Am. St. Rep. 425.

"The annotator in Cyc., referring to this case, says: 'However this may be, it is clear that it violates no principle of the Federal Constitution, as the Supreme Court of California seems to suppose.' 19 Cyc. 1228.

"Upon the whole, while we are free to confess that this point makes a deep impression on our

minds, yet this is a matter which should be passed upon by the Supreme Court of the United States, and we hold that the decisions are not so clear as to authorize this court to declare the act in question violative of the Fourteenth Amendment to the Constitution of the United States.

"The second section of the act (1907, p. 421) is not violative of Section 45 of the Constitution of 1901. The title of the act is sufficient to cover the levy for the county purposes, the same being referrible and cognate to the general subject of providing revenue for the State. If there were no mention of the counties the commissioners' court of each county could levy a tax for such county. Code, 1907, Sec. 2155.

"The judgment of the court is affirmed.

"Bowdell, Denson, McClellan, and Mayfield, JJ., concur.

"Anderson, J., dissents."

The dissenting opinion of Judge Anderson is as follows:

"I agree with my brethren upon the proposition that all doubts should be resolved in favor of the validity of the act assailed, when the assailant has the right of appeal to the Supreme Court of the United States, and that the State's right to do so is questionable. I do not think, however, that the infirmity of the act in question is open to serious doubt; and notwithstanding the high regard I have for the opinion of my associates, the infirmity of the act is to me so glaring that I deem it my imperative duty to construe the law as I understand it—regardless of consequences or whether the State has, or has not, the right of appeal.

"Pretermitting the other questions insisted upon by appellants, against the validity of the act in question, I am of the opinion that it is violative of the Fourteenth Amendment to the Federal Constitution in that the classification attempted is so unreasonable and unjust as to amount to a discrimination against one and in favor of other members of the same class. The classification has no reference to the subject or business, but is based solely on the residence of the corporation. There can be no doubt that the States have the right to require certain things of foreign corporations as a condition precedent to doing business therein, but when they enter the State upon its invitation, and after complying with its requirements, they are entitled to the equal protection of the law and which includes a guaranteed uniformity in taxation. To my mind equal protection is not accorded when one railroad is taxed thousands of dollars more than others of equal value and similarly situated, the only distinction being that one is a foreign and the other a domestic corporation, notwithstanding the tax may be designated as a franchise tax in order to avoid the influence of the State Constitution against unequal taxation on property. That the State may levy a reasonable franchise tax on corporations there can be no doubt, but it has no right to levy such a tax on one and relieve another engaged in the same identical business, simply because one is foreign and the other is domestic. The right of the State to prescribe conditions upon which a foreign corporation should enter refers to the tax imposed for the privilege of acting in a corporate capacity in the State. 'It does not mean that after the corporation has been admitted into the State and paid the charge exacted for admission, it is not entitled to due process of law or the equal benefit of the laws, under the Federal Con

stitution, or equality and uniformity under the State Government. The situation is therefore analogous to that of a domestic corporation. The State may impose such exaction as it pleases as a condition for granting the corporate franchise, but when the corporation is organized, its property is to be taxed as other property, subject to such classification and qualification as may lawfully be made.' Judson on Taxation, Sec. 168.

"It may be that the State has the right to prevent the doing of intrastate business by a nonsubmitting corporation, and which is the penalty prescribed by the statute; but it must be borne in mind that we are dealing with the State's right to collect and retain this illegal tax, and not with its right or recourse against the plaintiff for resisting the right to collect and retain said tax.

"The question before us is, was the tax lawfully levied? If it was, the plaintiff can not recover it; if not legal it can recover it back. What the State can and will do for a refusal to submit we are not called upon to decide. 'Sufficient unto the day is the evil thereof,' as we are dealing with the right to levy and collect, and not the penalty for a refusal to submit. Should the State attempt to deprive many of her citizens dependent solely on foreign corporations for a means of travel and transportation, because said corporations do not submit to an unjust discrimination, will, of course, work a hardship upon many of her inhabitants and deprive them of the advantages and conveniences of the present age of progress and enterprise, and which can not be taken from their more fortunate neighbors situated on domestic lines, and would create a condition to be deplored. But this threatened and impracticable disaster should not deter courts from condemning all laws of an unjust

and discriminatory character such as the one in question.

"I regret my inability to concur in the conclusion of my brothers, and am constrained to voice my protest against this statute, as it involves not only a year's taxation but a principle so far-reaching and important as to not only affect the integrity of the State, but threatens the sacred rights secured by our Federal Constitution. Citation of authority is not required to demonstrate the inequality of this law and that the classification therein attempted is unreasonable and unjust. Nor do I feel it necessary to comment on many of those mentioned in the opinion, but will content myself with a short discussion of what seems to be the three leading cases relied upon as supporting the conclusion of the majority.

"The case of Ducat v. Chicago, 10 Wall. 410, does not apply to the present question. There the Fourteenth Amendment was not considered, and while the case may have been decided subsequent to the adoption of same, the statute considered was enacted prior to the amendment and the alleged violation of same was anterior to said amendment.

"The cases of New York v. Roberts, 171 U. S. 658, and Horn Silver Mining Co. v. New York, 143 U. S. 305, do not support the law in question. The statutes there considered dealt with foreign and domestic corporations in the same manner. Indeed, the opinion in each case is guarded on this point and stresses the fact that there was no discrimination against foreign corporations simply because they were foreign instead of domestic. In the Horn Silver Mining Company case *supra* the court, speaking through Justice Field, says: 'It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation.' And in the Robert case, *supra*, we find the fol

lowing guarded expression: 'It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax, but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State.' It is therefore inferable that the statute would have been condemned had it discriminated against foreign corporations of the same class as the domestic ones, and which is done by the law in question.

"I dissent from the conclusion of the majority and think this tax was illegal and the plaintiff should recover it back."

We respectfully submit that the judgment of the lower court should be reversed.

Respectfully,

ALEX P. HUMPHREY,
Of Counsel.

ALFRED P. THOM,
JAMES WEATHERLY,
HUMPHREY & HUMPHREY,
Counsel.

APPENDIX.

No. 384.) AN ACT. (H. 611.

To provide for the Revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax.

Section 1. *Be it enacted by the Legislature of Alabama*, that every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State, is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one thousand dollars. C. Each foreign

corporation whose actual amount of capital employed in this State exceeds One Thousand Dollars shall pay an annual franchise tax of twenty-five per centum on the first One Hundred Dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of One Hundred Dollars and up to and including One Thousand Dollars, and one-tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over and above One Thousand Dollars. E. The President, or other executive head, and the Secretary of every foreign corporation subject to a tax under this Act, shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus

obtained that the amount of the capital of the corporation actually employed, or to be employed, as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed or to be employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. F. No foreign corporation which has paid the tax required under this Act, shall be required to pay the taxes imposed by Sub-division 24 of Section 4122 of the Code of 1896 as amended by an Act of the General Assembly entitled an Act to further amend the Revenue laws of the State of Alabama, approved March 5th, 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year as provided by the cor-

poration laws now in force in this State shall be required to pay a franchise tax under this Act before the first day of January, 1908. I. The payment of the franchise tax required by this Act, in any one county shall be sufficient notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Sec. 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the County Treasurer for the use of the County.

Approved 3 7, 1907.

THE STATE OF ALABAMA.

DEPARTMENT OF STATE.

I, FRANK N. JULIAN, Secretary of State, do hereby certify that the pages hereto attached, contain a true, accurate and literal copy of House Bill No. 611, approved March 7th, 1907, as the same appears on file and of record in this office.

In Testimony Whereof, I have hereunto set my hand and affixed the great seal of State, at the Capitol, in the city of Montgomery, this 8th day of March, One Thousand Nine Hundred and Seven.

FRANK N. JULIAN,

[Seal.] Secretary of State.

From the foregoing, the opinion of this court is as follows:

1. The Doyle and Prewitt cases do not have the slightest application to the case at bar. In those cases property rights were not involved. The mere naked right to a license to do business by a foreign corporation was considered.

* * * *

4. The statute is void, because it is an effort to impair and to repudiate the contract of the State, made with the company, by which it was induced to come into the State, making investments in large sums, and was authorized to do a state business, but now declaring that it shall not do such business, thereby rendering it insolvent, and taking from the people along its line the use of a railway for State business, unless the company will surrender under coercion rights given it by the national Constitution and valid enactments of Congress."

The two cases last cited, support both propositions contended for by plaintiff in error, viz.: 1st. That after it has permitted a foreign railroad corporation to come into the State and do business within its domain, **and to acquire a railroad therein,** the State cannot arbitrarily exclude such corporations from doing even an intrastate business within its domain, because to do so would violate the Fourteenth Amendment of the Constitution of the United States, and, 2nd, That when a State grants to a railroad corporation the right to enter the State, and to acquire a railroad therein, it impliedly contracts that it shall have the right to do a general common carrier business with such railroad, and cannot arbitrarily exclude it from doing any part of such business. This last phase of the case is fully supported by the case of Erie Railroad vs. Pennsylvania, 153 U. S., 628, provided the contention made by us in Part I, page —— of this brief that the purchase from domestic corporations of railroad property and franchises, and the assumption of the duties imposed by such franchises constitutes a good consideration for the grant made by the State, (under sections 1169 and 1170 of the Code

of Alabama, of 1896, to foreign corporation) of the right to buy the property and franchises of domestic corporations."

Salt Co. vs. East Saginaw, 13 Wall., 378.
Whitman vs. Oxford Nat. Bank, 176 U. S., 563.
Bernheim vs. Converse, 206 U. S., 529.

In the case of Erie Railroad vs. Pennsylvania, a New York corporation constructed its railroad through a part of the State of Pennsylvania, under two acts of the legislature authorizing it to do so, and requiring it to pay to the State of Pennsylvania annually the sum of ten thousand dollars; the road was constructed, and subsequently an act was passed requiring railroad corporations doing business "upon payment of any interest upon any scrip, bond or certificate of indebtedness, issued by said corporation to the residents of this commonwealth, and held by them, to assess the tax imposed provided for State purposes upon the nominal value of each and every evidence of indebtedness, and to report on oath annually on the first Monday in November to the Auditor General the amount of indebtedness of the corporation owned by residents of this commonwealth, as nearly as the same can be ascertained," etc. The railroad corporation declined to obey this statute.

The Court, on page 641, said:

"The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie and Western Railroad Company is a private corporation of another State; that it has no right to do business in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. This view was expressed by the Supreme Court of Pennsylvania in Commonwealth vs. New York, Lake Erie & Western Railroad, 129 Penn. St., 463, 476, in the following language: 'It was competent for the legislature of Pennsylvania to impose as a

condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted. Chicago Life Ins. Co. vs. Needles, 113 U. S., 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this State as a matter of grace and not of right?'

* * * *

Assuming, for the purposes of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case, and need not be repeated. When the State, by the acts of 1841 and 1846, gave this assent, the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts, was not overlooked;

for, by the seventh section of the act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges and provisions contained n the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, 'if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges (provisions) of this act.' And the question whether the privileges granted had been misused or abused, or the provisions of the act violated, was to be determined by **scire facias** issued out of the Supreme Court of Pennsylvania. Sec. 7. There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits."

It follows from these cases that plaintiff in error is within the jurisdiction of the State of Alabama, and cannot be arbitrarily excluded therefrom, and that the State cannot deny to it the equal protection of the laws, and as the act complained of attempts to do this, it is in conflict with the Fourteenth Amendment of the Constitution of the United States and void.

III

INTERSTATE COMMERCE.

The third assignment of error reads as follows:

"3. In and by the complaint filed in said cause and

the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of Clause 3 of Section 8 of Article I of the Constitution of the United States, in that said Act operates as an interference with the regulation of Interstate Commerce by Congress, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that the said Act of the Legislature of the State of Alabama, is valid and does not constitute an interference with the regulation of Interstate Commerce by Congress."

The statute complained of, when applied to a corporation engaged in both interstate and intrastate commerce, is an unlawful interference with interstate commerce, whether such corporation does one inseparable business, or two separate businesses. The statute imposes the tax upon the whole business and would be payable even if the corporation desisted entirely from the conduct of all intrastate business. It is true that the statute provides that if a corporation fails to pay the tax when it becomes due, it shall not have the right to do an intrastate business in the State, but the imposition of this penalty does not relieve the corporation from liability for the tax. The tax can be recovered by suit whether the penalty be imposed or not.

State vs. Fleming, 112 Ala., 179.

In the case of Pickard vs. Pullman Southern Car Co., 117 U. S. 34, the court speaking of a privilege tax upon the use of sleeping cars through the State of Tennessee, says:

"The tax was a unit, for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car

was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee; because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation; and the cars had no **situs** within the State for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

The court further reviewed all of the authorities upon the right of the State to tax instrumentalities of interstate commerce, and after making such review, held the tax to be an unlawful interference with interstate commerce, and, therefore, void.

In the case just quoted from, the tax was levied upon the sleeping car, but in the case of Allen vs. Pullman Company, 191 U. S., 177, the tax was levied upon the privilege of doing a sleeping car business in the State, and it was there held that the tax was upon the entire business, interstate as well as intrastate, and constituted an unlawful interference with interstate commerce, and was void.

In Crutcher vs. Kentucky, 141 U. S., 59, a license was imposed upon an express company for doing business in the State, and it was held to be an interference with the powers of Congress over interstate business. The court says:

> "The case is entirely different from that of a foreign corporation seeking to do business that does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all of the conditions imposed by the Legislature of that State."

There is no substantial distinction between the last two cases cited and the case at bar. In one of the cases cited,

the tax was a privilege tax for doing a sleeping car business in the State, and in the other on the privilege of doing an express business, while the tax complained of in the case at bar, as applied to plaintiff in error, and as construed by the Supreme Court of Alabama, is a privilege tax for doing a railroad business. In each case the business taxed was in part interstate and in part intrastate, and the tax was for doing the business as a whole, and was and is, therefore, in part a tax upon interstate business, and, therefore, an unlawful interference with the regulation of Congress of interstate commerce.

Even if the act complained of had attempted to levy the tax only upon the intrastate business done in the State of Alabama, it would nevertheless have resulted in an imposition of a burden upon its interstate business.

In the case of Pullman Co. vs. Adams, 189 U. S., 420, the tax was imposed only upon sleeping cars carrying passengers from one point in the State to another, and the court held that if under the constitution and statute of the state a sleeping car could not do an interstate business without also doing an intrastate business, the tax would constitute a burden upon interstate business, and the statute imposing it would be void.

If then, under the laws and Constitution of the State of Alabama, plaintiff in error's interstate and intrastate business is so bound together as to constitute one inseparable business so that plaintiff in error cannot be excluded from doing an intrastate business without, at the same time, being excluded from doing an interstate business, any arbitrary burden placed upon said business and not placed upon domestic corporations engaged in the same class of business, under the same circumstances, is an unlawful interference with interstate commerce, and the law creating such burdens is void.

Plaintiff in error having its railroad properties in the State of Alabama, could not be excluded from operating the same in the conduct of an interstate business.

Pensacola Tel. Co. vs. W. U. Tel., 96 U. S. 1.
Horn Silver Mining Co. vs. New York, 143 U. S. 315.
Postal Tel. Co. vs. Adams, 155 U. S., 695.

It, therefore, has the right to be a railroad corporation and do an interstate business in Alabama, and Section 242 of the Constitution authorizes it to do the business of a common carrier and requests it to transport the freight, passengers and cars, loaded or empty, of all other railroads; it reads as follows:

> Sec. 242. All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this state, and connect at the State line, with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers, and cars, loaded or empty, of the others, without delay or discrimination.

In execution of this provision of the Constitution, Section 3459 (1158) of the Code of Alabama provides as follows:

> 3459 (1158) Railroads Public Highways—The main track of every railroad in this State is a public highway over which all persons have equal rights of transportation for passengers and freight on the payment of just compensation therefor to the owner of the railroad.

And Section 5549 of the Code of 1907 provides:

> "Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever tendered at a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law or the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and shall forward the same without delay and within a reasonable time to the point of destination, under and in compliance with such reasonable rules, regulations and

requirements as may be prescribed by the railroad commission or by law, and, upon the failure of any such railroad company or other common carrier doing business in this State to so receive and so transport goods, merchandise, or property of any description, delivered to it for shipment to and from any points within the State in such reasonable time as the railroad commission or the law may prescribe unless otherwise agreed upon between the company and the shipper, or unless such property be burned, stolen, or otherwise destroyed, such railroad company or other common carrier shall forfeit to the party aggrieved such sum as may now or hereafter be prescribed by law for such delay, and, in addition shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport."

Under these provisions a railroad, when it engages in business of any kind in the State, is obliged to do a common carrier business therein, and could not abandon or cease to do its intrastate business without altogether retiring from the State.

Again: The third count of the complaint alleged that plaintiff in error's railroad properties operated in Alabama were purchased from domestic corporations organized under the laws of said State, and as amended. (Rec. p. 40) said count alleges that in and by the several charters of the railroad companies the properties and franchises, of which plaintiff in error purchased or leased the right was conferred and the duty imposed upon said companies to receive and transport for hire or compensation over their respective roads as public highways, and by said companies as common carriers, passengers and freight tendered to them respectively for transportation from points in the State of Alabama to other points within said State and between said points in the State of Alabama and points in other States, and to receive and transport freight and passengers in cars loaded or empty from other railroads doing business in Alabama which were being transported from one point in the State of Alabama to another

point in said State, and also freight and passengers and cars loaded or empty of other railroads being transported between points in the State of Alabama and points in other States.

It follows, therefore, that the plaintiff in error not only has the right to do both an interstate and intrastate business with its property, but that it is bound by its contracts and by the Constitution and laws of the State to do an inseparable interstate and intrastate business; under its contracts and under the Constitution and laws of the State, it cannot conduct one without conducting the other, and any burden, therefore, put upon this inseparable business is, under the authorities cited above, an unlawful interference with commerce and, therefore, void.

It is submitted, that, for the several reasons raised by the assignments of error, and pointed out in this brief, the law under which the tax complained of was assessed, is in conflict with the Constitution of the United States and void, and that the complaint in the cause stated a good cause of action, and that the City Court of Montgomery erred in sustaining demurrers thereto, and the Supreme Court of Alabama erred in affirming the said judgment of the City Court of Montgomery, and for these reasons the plaintiff in error prays a reversal of said cause.

GREGORY L. SMITH,
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HENRY L. STONE,
Of Counsel.

POINTS AND AUTHORITIES.

I
IMPAIRMENT OF CONTRACTS.

When a corporation is organized under a general law, the powers conferred by such law become its charter.

> Granger Life & Health Ins. Co. vs. Kamper, 73 Ala., 242.

Generally speaking, the rights of a corporation are determined by the laws in force when it came into being.

> Bibb vs. Hall & Farley, 101 Ala., 98.

The domestic corporations, whose property and franchises were purchased by plaintiff in error, had charter rights to do an interstate and intrastate business in Alabama, and these could not be impaired by legislation.

> Dartmouth College vs. Woodward, 4 Wheat., 518.
> State of Ala. vs. Bible Society, 134 Ala., 634.

This is true whether the corporations were formed under special or general laws.

> Salt Co. vs. East Saginaw, 13 Wall., 378.
> Stanilaus Co. vs. San Joaquin, 192 U. S., 206.

Of the corporation whose properties, franchises and rights were purchased by the plaintiff in error (the Mobile & Montgomery Railroad Company) was organized under the Constitution of Alabama of 1868, and the other of said corporations were organized under the Constitution of Alabama of 1875. No right to alter, amend or repeal charters was reserved in the Constitution of 1868.

In a case involving the Constitution of the United States,

the Federal Courts will not follow the decisions of the state courts construing an act alleged to violate the Federal Constitution but will construe such act for themselves.

Douglas vs. Kentucky, 168 U. S., 500.
Vicksburg vs. Vicksburg Water Works, 202 U. S., 467.
Powers vs. Detroit & Grand Haven Rwy., 201 U. S., 550.

The provisions of Section 23 of Article I of the Constitution of Alabama, of 1875, forbidding the grant of any irrevocable special franchises does not authorize the revocation at will of any franchise granted, but only their revocation upon reasonable conditions fixed by law.

Mayor, etc., of Houston, vs. Houston City Rwy., 19 S. W., 129.

When an instrument makes general provisions for a subject and then provides specially for a part of that subject, the special provisions as to such subject must prevail.

State vs. Inhabitants of Trenton, 38 N. J. Law, 64.

When an instrument contains two inconsistent provisions, the latter of such provisions must prevail over the former.

Hand vs. Stapleton, 135 Ala., 162.

Charter rights cannot be altered, amended or revoked under the powers reserved in the Constitution of Alabama, so as to work an injustice to stockholders.

Vicksbrug vs. Vicksburg Waterworks, 202 U. S., 465.

Under the right reserved in a Constitution to alter, amend or repeal the charter, the alterations must be reasonably made in good faith, and must be consistent with the scope and object of the incorporation.

Stanilaus Co. vs. San Joaquin C. & I. Co., 192 U. S., 213.

A State cannot, under such reserved rights, take away or destroy rights, which by a legitimate use of the powers granted have become vested in a corporation.

Miller vs. State, 15 Wall., 498.

A State cannot, under the reserved rights, alter, amend or repeal a charter by imposing arbitrary burdens upon one set of persons or corporations within its jurisdiction, not imposed upon others, and not justified by the character of the business in which such corporations are engaged in reference to such burdens.

S. & N. Ala. R. R. Co. vs. Morris, 65 Ala., 193.
Gulf, Col. & Santa Fe Rwy. vs. Ellis, 165 U. S., 151.
Phoenix Carpet Co. vs. State, 118 Ala., 143.
City Council Montgomery vs. Kelly, 142 Ala., 557.
Cotting vs. K. C. Stock Yards, 183 U. S., 102.
Magoun vs. Ill. Trust & Sav. Bk., 170 U. S., 293.

The imposition of such burdens does not constitute an alteration, amendment or repeal within the reserved power.

Vicksburg vs. Vicksburg Waterworks, 202 U. S., 465.

Where a corporation has power in its charter to sell and assign its franchises, such franchises are as inviolable in the hands of the assignee as they were in the hands of the original corporation.

Vicksburg vs. Vicksburg Waterworks, 202 U. S., 465.
Port of Mobile vs. L. & N. R. R. Co., 84 Ala., 115.
Wilmington R. R. vs. Reid, 13 Wall., 267.
Pennsylvania College Cases, 13 Wall., 212.
Willamette Manufacturing Co. vs. Bank, 119 U. S., 191.

The effect of Section 1169 and Section 1170 of the Code

of Alabama of 1896 was to authorize the domestic corporations to sell their franchises, and was in the nature of an amendment of their charters.

L. & N. R. R. Co. vs. State, 45 Sou., 302.

The acceptance of a franchise granted by the State is a good consideration for its grant.

State of Ala. vs. Alabama Bible Assn., 134 Ala., 634.

The provisions of Sections 1169 and 1170 of the Code of 1896 are not like a tax provision, such as is found in Wisconsin & Mich. R. R. Co. vs. Howard, 191 U. S., 385. They were not bounty statutes, but charter, or contract statutes.

Salt Co. vs. East Saginaw, 13 Wall., 378.
Whitman vs. Oxford Nat. Bk., 176 U. S., 563.
Bernheimer vs. Converse, 206 U. S., 529.
Powers vs. Detroit & Grand Haven R. R. Co., 201 U. S., 556.
Commonwealth vs. Railroad Co., 95 Ky., 70; 23 S. W., 868.

The provisions of Section 1169 of the Code of 1896 are similar to the provisions found in the case of American Smelting Co. vs. Colorado, 204 U. S., 113.

And constituted a contract between the State and the plaintiff in error.

The statute imposing the tax complained of imposes the tax upon the business of the plaintiff in error as an entirety, and, therefore, imposes it upon that portion of the business carried on with the property and franchises which was purchased by the plaintiff in error from the domestic corporations under the acts of the legislature, which formed Sections 1169 and 1170 of the Code of 1896.

Pickard vs. Pullman Co., 117 U. S., 34.
Allen vs. Pullman Co., 191 U. S., 177.

The fact that there is a provision in the statute prohibit-

ing corporations from doing intrastate business if they fail to pay the tax within sixty days after it becomes due does not confine the State to this forfeiture as the only remedy; the State may in addition to the forfeiture, sue for and recover the tax.

State vs. Fleming, 112 Ala., 179.

The tax is upon the entire business, and it does not make any difference whether it is called a property tax or a privilege tax. The provisions of the Constitution of the United States cannot be evaded by the name under which the tax is assessed.

Galveston & Harrisburg, etc., Rwy. Co. vs. Texas, 210 U. S., 237.
Wilmington R. R. Co. vs. Reid, 13 Wall., 264.

If there was no contract between the State of Alabama and the plaintiff in error, but only a contract of sale between the domestic corporations, and the plaintiff in error, such contract would be protected by the Constitution of the United States.

Green vs. Biddle, 8 Wheat., 1.
Von Hoffman vs. City of Quincy, 4 Wall., 549.

The allegations of the complaint sufficiently show that the plaintiff in error had the charter power to purchase the property and franchises of the Alabama domestic corporations.

L. & N. R. R. vs. State, 45 Sou., 296.

If this were not so, still the doctrine of ultra vires has no application to an executed contract, and cannot affect the title to property obtained thereunder.

B. & W. R. P. Co. vs. Moore, 121 Ala., 382.

The assent of stockholders of a domestic corporation to the sale of their property and franchises is not material. That question cannot be raised by the State.

L. & N. R. R. vs. Gray, 45 Sou., 306.
West Point R. R. vs. Allen, 143 Ala., 547.
Barrett vs. Pollak, 108 Ala., 396.
Ala. Iron & Steel Co. vs. McKeever, 112 Ala., 134.

The statute complained of denies to the plaintiff in error the equal protection of the laws.

A statute which places upon a person within the jurisdiction of the State arbitrary burdens not placed upon other persons doing the same kind of business under the same circumstances, denies to the person upon whom it is placed the full protection of the laws.

Raymond vs. Chicago Traction Co., 207 U. S., 35.
Connolly vs. Union Sewer Pipe Co., 184 U. S., 558.
Cook vs. Marshall Co., 196 U. S., 274.
Cotting vs. K. C. Stock Yards, 183 U. S., 105.

II

DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The State may tax certain property or certain callings, so long as there is no arbitrary discrimination against persons engaged in said callings under like circumstances.

Amour Pkg. Co. vs. Lacy, 200 U. S., 235.
Kehrer vs. Stewart, 197 U. S., 69.
Home Ins. Co. vs. New York, 134 U. S., 606.
Magoun vs. Illinois Trust & Sav. Bk., 170 U. S., 293.

When a law imposes arbitrary burdens upon one set of persons or corporations, within the jurisdiction of the State, not imposed upon others and not justified by the character of the business of such persons or corporations with reference to such burdens so as to form a just basis for their imposition, it denies to such persons or corporations the equal protection of the law and is in conflict with the Fourteenth Amendment of the Constitution of the United States.

S. & N. Ala. R. R. Co. vs. Morris, 65 Ala., 193.
Gulf, Col. & Tenn. Rwy. vs. Ellis, 165 U. S., 151.
Phoenix Carpet Co. vs. State, 118 Ala., 143.
City Council of Montgomery vs. Kelly, 142 Ala., 557.
Cotting vs. K. C. Stock Yards, 183 U. S., 102.
Magoun vs. Ill. Trust & Sav. Bk., 170 U. S., 293.

Even where a foreign corporation is within the domain of the State olny by license, it cannot be arbitrarily excluded when to so exclude it would violate any provision of the Constitution of the United States.

Nat. Council U. A. M. vs. State Council, 203 U. S., 153.
Securities Mut. Life Ins. Co. vs. Prewitt, 202 U. S., 249.

To exclude a railroad company from the domain of the State, after it has, with the permission of the State, purchased a railroad therein and is engaged in operating the same, would take its property without due process of law.

Ames vs. Union Pac. R. R., 64 Fed., 170.

Where no property rights are concerned, the State may arbitrarily exclude a foreign corporation from its boundary.

Security Mut. Life Ins. Co. vs. Prewitt, 202 U. S., 257.
N. W. Life Ins. Co. vs. Riggs, 203 U. S., 255.
Hammond Packing Co. vs. Arkansas, 212 U. S., 322.

Although it may generally put such burdens upon such corporations as it sees fit, as a condition to continuing business therein, the State cannot place arbitrary burdens upon a foreign railroad corporation which would operate to take its property without due process of law.

Smyth vs. Ames, 169 U. S., 469.

The distinction between an insurance company case and a case involving the right of a railroad company, lies in the fact that when a state permits a railroad company to acquire a railroad within its border, it impliedly agrees that it may utilize such property, and, because of the nature of the railroad business, it cannot exclude such corporation from its domain without taking this property.

Nat. Council U. A. M. vs. State Council, 203 U. S., 161.
Sea Board Air Line Co. vs. R. R. Commission, 155 Fed., 803.
Chicago R. I. & C. R. R. vs. Swanger, 157 Fed., 791.
Erie R. R. vs. Pennsylvania, 153 U. S., 628.

III

INTERSTATE COMMERCE.

The Act of the Legislature complained of interferes with the regulation by Congress of interstate commerce.

Under the statute complained of, the State can sue for and recover the tax wholly irrespective of the clause which forfeits the right of the corporation to do an intrastate business for the non-payment of the tax.

State vs. Fleming, 112 Ala., 179.

The tax is placed upon the corporation as a unit, and is, therefore, inseparable.

Pickard vs. Pullman Pal. Car Co., 117 U. S., 34.
Allen vs. Pullman Co., 191 U. S., 177.
Crutcher vs. Kentucky, 141 U. S., 50.

If the tax was imposed only on intrastate business, and if the intrastate business of plaintiff in error was separable from its interstate business, still the statutes would interfere with the control of interstate commerce by Congress, if, under the Constitution and laws of Alabama, the intrastate

business could not be abandoned without abandoning the interstate business.

Pullman Co. vs. Adams, 189 U. S., 420.

The plaintiff in error has the right, under the Federal Constitution to do an interstate business in Alabama.

Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S., 1.
Horn Silver Mining Co. vs. New York, 143 U. S., 315.
Postal Telegraph Co. vs. Adams, 155 U. S., 695.

Under Section 242 of the Constitution of Alabama, and Sections 3459 and 5549 of the Code of Alabama of 1907, every railroad corporation doing an interstate business in the State is obliged also to do an intrastate business, so that plaintiff in error could not abandon its intrastate business without abandoning its interstate business, and the act, therefore, interferes with the regulation of interstate commerce by Congress under the authority supra.

Under the charters of the several domestic corporations whose property, rights and franchises were acquired by purchase from such corporations by the plaintiff in error, such corporations were obliged to do an intrastate business as well as an interstate business, and when these franchises were assigned to the plaintiff in error it became bound by its contract with the State, to do such intrastate business, and cannot therefore, abandon that portion of its business without violating the contract under which it acquired its franchises.

ANDERSON, J. (Dissenting).

I agree with my brethren, upon the proposition, that all doubts should be resolved in favor of the validity of the Act assailed when the assailant has the right of appeal to the Supreme Court of the United States and the State's right to do so is questionable. I do not think, however, that the infirmity of the Act in question, is open to serious doubt, and notwithstanding the high regard I have for the opinion of my

associates, the infirmity of the Act is to me so glaring that I deem it my imperative duty to construe the law as I understand it regardless of consequences or whether the State has or has not the right of appeal.

Pretermitting the other questions insisted upon by Appellants, against the validity of the Act in question, I am of the opinion that it is violative of the Fourteenth Amendment to the Federal Constitution in that the classification attempted is so unreasonable and unjust as to amount to a discrimination against one and in favor of other members of the same class. The classification has no reference to the subject or business, but is based solely on the residence of the corporation. There can be no doubt, that the States have the right to require certain things of foreign corporations as a condition precedent to doing business therein, but when they enter the State, upon its invitation, and after complying with its requirements, they are entitled to the equal protection of the law and which includes a guaranteed uniformity in taxation. To my mind equal protection is not accorded when one railroad is taxed thousands of dollars more than others of equal value and similarly situated, the only distinction being that one is a foreign and the other a domestic corporation, notwithstanding the tax may be designated as a franchise tax in order to avoid the influence of the State Constitution against unequal taxation on property. That the State may levy a reasonable franchise tax on corporations there can be no doubt, but it has no right to levy such a tax on one and relieve another engaged in the same identical business, simply because one is foreign and the other is domestic. The right of the State to prescribe conditions upon which a foreign corporations should enter refers to the tax imposed for the privileges of acting in a corporate capacity in the State. " It does not mean that, after the corporation has been admitted into the State and paid the charge exacted for admission, it is not entitled to due process of law or the equal benefit of the laws, under the Federal Constitution, or equality and uniformity under the State government. The situation is therefore

alogous to that of a domestic corporation. The State may pose such exaction as it pleases as a condition for granting e corporate franchise, but when the corporation is organ-ed, its property is to be taxed as other property, subject to ch classification and qualifications as may lawfully be ade."—Judson on Taxation, 168.

It may be that the State has the right to prevent the ing of intrastate business by a non-submitting corporation, d which is the penalty prescribed by the statute; but it ust be borne in mind that we are dealing with the State's ght to collect and retain this illegal tax and not with its ght of recourse against the plaintiff for resisting the right collect and retain said tax.

The question before us is, was the tax lawfully levied? it was, the plaintiff cannot recover; if not legal it can re-ver it back. What the States can and will do for a refusal submit, we are not called upon to decide. "Sufficient unto e day is the evil thereof," as we are dealing with the right levy and collect and not the penalty for a refusal to sub-it. Should the State attempt to deprive many of her citi-ns dependent solely on foreign corporations for a means of avel and transportation, because said corporations do not bmit to an unjust discrimination, will, of course, work a rdship upon many of her inhabitants and deprive them of e advantages and conveniences of the present age of prog-ss and enterprise, and which cannot be taken from their ore fortunate neighbors situated on domestic lines, and ould create a condition to be deplored. But this threatened d impracticable disaster should not deter courts from con-emning all laws of an unjust and discriminatory character ch as the one in question.

I regret my inability to concur in the conclusion of my other, and am constrained to voice my protest against this atute, as it involves not only a year's taxation but a prin-ple so far reaching and important as to not only affect the tegrity of the State, but threaten the sacred rights secured y our Federal Constitution. Citation of or criticism of au-

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thorities is unnecessary to harmonize my conclusion with our organic law, and I will content myself by merely calling attention to an inapt comment in the opinion in reference to the case of **Ducat vs. City of Chicago,** 10 Wall., 410. This case may have been decided after the adoption of the Fourteenth Amendment, but the statute and proceedings to test same were anterior thereto and I do not understand the case as pertinent to the present question.

COPY.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT.

THE SUPREME COURT OF ALABAMA.

6th Div. No. 692.

Southern Railway Company, Appellant,

vs.

Samuel E. Greene, Appellee.

From Birmingham City Court.

he State of Alabama,
ity and County of Montgomery. }

I, Robert F. Ligon, Clerk of the Supreme Court of Alaıma, do hereby certify that the foregoing pages, numbered om one to fourteen inclusive, contain a full, true and corct copy of the opinion of said Supreme Court in the above ated cause, as the same appears and remains of record and file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, this the 12th day of February, 1909.

(Signed) ROBT. F. LIGON,

Clerk of the Supreme Court of Alabama.

Office Supreme Court, U. S.
FILED.
DEC 3 1909
JAMES H. McKENNEY,
Clerk.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States

OCTOBER TERM 1909.

No. 451

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Plaintiff in Error,

versus

JOHN B. GASTON

GREGORY L. SMITH,
Attorney for Plaintiff in Error.

H. L. STONE,
of Counsel.

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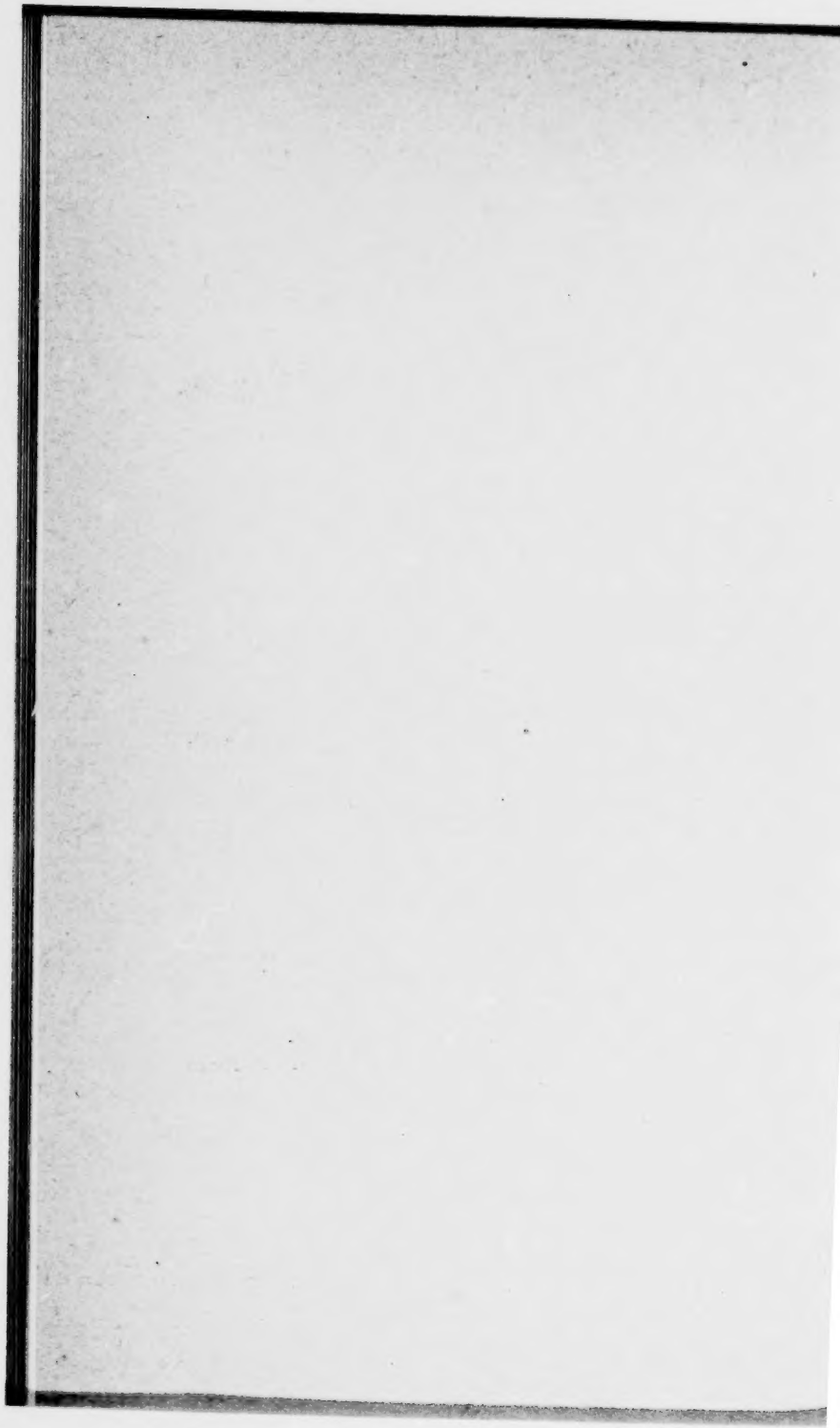

Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Plaintiff in Error,

versus

JOHN B. GASTON, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Under the laws of Alabama every corporation, **domestic and foreign,** is liable to a uniform tax upon its tangible property. Every common carrier and public utility corporation, **domestic and foreign,** is subject to a tax upon its franchise or intangible property. (Code of Alabama, 1907, Sec. 2364.)

Every corporation—domestic and foreign—was required to pay a tax on its gross earnings. (Code of 1896, Sec. 3489.)

Every domestic corporation is required to pay, when it is organized, a charter fee of $1.00 for every $1000.00 of the proposed capital stock, but in no case less than $5.00. (Code of 1907, Sec. 3450.)

Every foreign corporation admitted to do business in the State is required, before engaging in business in the State, to pay upon the amount of its capital actually employed in the State a tax of $25.00 on the first $100, $5.00 on each additional $100 of capital up to $1000 of capital, and $1.00 per $1000 on every $1000 of capital in excess of $1000. (Sec. 3647, Code 1907.)

Corporations that were already qualified to do business in the State when the Act providing for this tax was passed, are, by a subsequent Act excepted from its provisions.

Foreign corporations are further required to pay fee of $10.00 to the Secretary of State for issuing to it a license to do business in the State. (Sec. 3652, Code 1907.)

Foreign corporations are required, before doing business in the State, to file with the Secretary of State an instrument in writing, under the seal of the corporation, and signed officially by the President and Secretary thereof, designating a known place of business in the State, and an authorized agent residing thereat (Sec. 3642, Code 1907), and also to file with the Secretary of State a certified copy of its articles of incorporation or association. (Constitution, Sec. 232.)

All of these provisions of law were in force, and their terms had been fully complied with by plaintiff in error when the legislature passed the Act complained of, which reads as follows:

> An Act to provide for the Revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax.
>
> Section 1. Be it enacted by the Legislature of Alabama, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate of the county in which it has a resident agent, a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State is one hundred dollars or less, shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation, whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars, shall pay an annual franchise tax of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it, over one hundred dollars, and up to and not exceeding the said limit of one

thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceeds one thousand dollars shall pay an annual franchise tax of twenty-five per centum on the first one hundred dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of one hundred dollars and up to and including one thousand dollars, and one-tenth of one per centum upon all such remaining actual amount of capital employed in this State by it over and above one thousand dollars. E. The President, or other executive head, and the Secretary of every foreign corporation subject to a tax under this act, shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State or County under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State if it is a corporation at the time of the statement authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed, or to be employed as the case may be, in this State, is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceeding subsequent to the appeal shall be the same as in such cases. F. No foreign corporation which has paid the tax required under this Act, shall be required to pay the taxes imposed by Subdivision 24 of Section 4122 of the Code of 1896 as amended by an Act of the General Assembly entitled an

act to further amend the revenue laws of the State of Alabama, approved March 5th, 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of this State, upon a contract made in this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year as provided by the corporation laws now in force in this State, shall be required to pay a franchise tax under this Act before the first day of January, 1908. I. The payment of the franchise tax required by this act, in any one county, shall be sufficient, notwithstanding the said corporation may do business, or have a resident agent in more than one County. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Section 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the County for the use of such County an amount equal to one-half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the County Treasurer for the use of the County.

Approved March 7, 1907.

February 18, 1891, the following Act was passed by the legislature of Alabama (Acts 1890-1, page 1086):

AN ACT to authorize railroad companies chartered under the laws of the State of Alabama, whose capital stock is owned by the railroad corporation chartered under the laws of another state, to sell to such corporation owning its stock all of its property, roadbed, rights and franchises.

Section 1. Be it enacted by the General Assembly of Alabama, That in all cases in which all of the capital stock of a railroad company chartered under the laws of the State of Alabama is owned by a railroad company chartered by the laws of another state, it shall be lawful for such railroad company in this state to sell and convey to such railroad company owning its stock, all of its property, roadbed, rights and franchises; Provided, that said company purchasing said railroad shall keep an office and an agent in the State of Alabama, and that said railroad so purchased shall be in all respects subject to the laws of Alabama as if owned by a domestic corporation; And provided further, that all liens on such railroad, and the rights of creditors, shall be preserved unimpaired.

Approved February 18, 1891.

This Act was codified as Sec. 1169 in the Code of Alabama of 1896 without material change, and remained in force until amended by an act of the legislature (Acts 1898, page 28) which reads as follows:

AN ACT to amend Section 1169 of the Code.

Section 1. Be it enacted by the General Assembly of Alabama, That section 1169 of the Code shall be, and the same is hereby amended so as to read as follows, viz.: 1169. "Domestic may sell its property and franchise to foreign corporation. Whenever all of the capital stock of a railroad corporation chartered under the laws of this State is owned by a railroad corporation chartered by the laws of another State, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, road bed, rights and franchises; and it shall be lawful also for any railroad corporation chartered by the laws of another State, owning or operating by lease or otherwise, any railroad in this State, to purchase at judicial sale or otherwise, or to lease and to hold and use in such railroad, or to acquire, hold and use all or any part of the capital stock or of the property, road beds, rights and franchises of any railroad corporation of this State, with whose railroad the railroad of the purchasing or leasing corporation or its predecessor in interest shall be connected, either di-

rectly or by means of an intervening line; but the purchasing or leasing corporation shall keep an office and an agent in this State, and such railroad, so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation and all liens and rights of creditors shall be preserved unimpaired, and any and all purchases and leases such as are authorized by this act, heretofore made, are hereby legalized.

Approved February 7th, 1899.

This Act remained in force until after suit was brought in this case.

On February 11, 1891, the legislature of Alabama passed an act (Acts of 1890-1, page 568) which reads as follows:

AN ACT to amend section 1586 of the Code.

Section 1. Be it enacted by the General Assembly of Alabama, That section 1586 of the code of Alabama be, and the same is hereby amended so as to read as follows:

1586 (2011). Aid to, or purchase and lease of other roads.—A corporation chartered under the laws of this or any other state, heretofore or hereafter created, for the purpose of building, constructing or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad, for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation organized in pursuance of the laws of this, or any other state, may lease or purchase, any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no

such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof, at such time and place, and in such manner, as they shall designate; and the holders of a majority in value of the stock at such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto.

This Act became section 1170 of the Code of 1896 and remained in force until the suit in this case was commenced.

The plaintiff in error is a corporation organzed under the laws of Kentucky, with power and authority, under its charter as amended, to purchase, own and operate railroads in any of the other States in the United States, and especially in Alabama, in which state it began to do business as the owner of railroads on July 1, 1872, and has ever since continued to own, purchase, construct, lease, operate, control and maintain railroads as a common carrier in that state (Rec. page 4).

Under the provisions of section 1169 of the Code of 1896, and of the Acts from which said section was formed, and other acts amendatory thereof, plaintiff in error purchased, owned and operated the property, rights and franchises of several railroads, some of which were organized under special charters granted to them by the legislature of Alabama and others under the general incorporation laws of said State.

Under the provisions of 1170 of the Code of Alabama of 1896, and the act from which that section was formed, it purchased the property, rights and franchises of several other railroad corporations organized under the laws of Alabama.

The several properties purchased from domestic corporations constitute the major portion of the capital actually employed in Alabama by the plaintiff in error, upon the assessed value of which the tax complained of was based.

Among the rights and franchises owned and possessed by each of the domestic corporations, the property, rights and franchises of which were purchased by the plaintiff in

error, was the right to do both an intrastate and interstate common carrier business in the State of Alabama, and plaintiff in error was, at the time of the payment of the tax complained of, doing both an intrastate and interstate business in Alabama with the properties and under the franchises purchased by it from said several domestic corporations as heretofore stated.

By section 242 of the Constitution of Alabama it is provided as follows:

> Sec. 242. All railroads and canals not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this state, and connect at the state line, with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and each shall receive and transport the freight, passengers, and cars, loaded or empty, of the others, without delay or discrimination.

And by section 3459 of the Code of 1896 (Sec. 5520 of the Code of 1907) it is as provided as follows, viz.:

> 3459. Railroads public highways.—The main track of every railroad in this state is a public highway, over which all persons have equal rights of transportation for passengers and freight, on the payment of just compensation therefor to the owner of the railroad.

By section 5549 of the Code of Alabama of 1907 it is provided as follows:

> 5549. Reception and transportation of freight and cars required and provided for.—Every railroad or other common carrier subject to the provisions of this article, its agents or officers whose duty it is to receive freights, shall receive all articles of the nature and kind received by said carriers for transportation whenever tendered at

a regular station at proper hours and in good shipping condition, according to reasonable rules prescribed by law or the railroad commission, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and shall forward the same without delay and within a reasonable time to the point of destination, under and in compliance with such reasonable rules, regulations, and requirements as may be prescribed by the railroad commission or by law, and, upon the failure of any such railroad company or other common carrier doing business in this state to so receive and so transport goods, merchandise, or property of any description, delivered to it for shipment to and from any points within the state in such reasonable time as the railroad commission or the law may prescribe unless otherwise agreed upon between the company and the shipper, or unless such property be burned, stolen, or otherwise destroyed, such railroad company or other common carrier shall forfeit to the party aggrieved such sum as may now or hereafter be prescribed by law for such delay, and, in addition, shall be liable to the party aggrieved for such damages as he may sustain by reason of said delay, failure to receive or transport.

February 26, 1908, plaintiff in error caused a written statement to be made under oath (Record pages 31 and 32) showing the name of the plaintiff in error, the State and County under whose laws it was incorporated, its principal place of business in the State of Alabama, the total amount of its capital stock, and the actual amount of the capital employed in this State, and caused the same to be delivered, under protest, to the defendant in error as the Judge of the Probate Court of Montgomery County, in the State of Alabama; by said statement the actual amount of capital so employed by plaintiff in error in Alabama was shown to be $4,295,950.77. Upon the presentation of said statement to him, the defendant in error, as the Judge of the Probate Court of Montgomery County, Alabama, caused one of the officers of the plaintiff in error to come before him, and to be sworn and examined by him in reference to said matter (Record pp. 19 and 60), and after examining such officer defendant

in error, as such Judge of Probate, declared (Record pp. 8, 19, 21, 23, 25, 27, 30, 34, 60) that the assessed value of all of the tangible property of the plaintiff in error employed in the State of Alabama, without deducting the amount of liens and mortgages thereon, to be $15,704,215.00, and that such value of all of the tangible property of the plaintiff in error was the amount of its capital employed in said State within the meaning of the said Act of the legislature approved March 7, 1907, entitled

> "AN ACT to provide for the revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax."

and further found the amount of the tax payable under said Act to be $23,659.82. This sum plaintiff in error paid, under duress and protest, and at once notified defendant in error that it would bring suit to recover said sum of him.

Plaintiff in error brought suit to recover this sum upon the ground that the said Act of the legislature of Alabama is void.

> Wiley vs. Palmer, 14 Ala., 627.
> Raisler vs. Mayor and Council of Athens, 66 Ala. 194.

Among the grounds upon which it was claimed that said Act is void are the following, viz.:

> 1st: Because it is in contravention of Section 10, Article 1, of the Constitution of the United States.
>
> 2nd: Because it is in contravention of the provisions of the first section of the fourteenth amendment of the Constitution of the United States.
>
> 3rd: Because it interferes with the regulation by Congress of interstate commerce, in violation of clause 3, section 8, of Article 1 of the Constitution of the United States.

The complaint alleges in detail the facts from which the foregoing conclusions of fact follow, and expressly invokes the

protection of said several provisions of the Constitution of the United States.

The complaint as amended (Record pp. 2, 38, 61) was demurred to by the defendant in error (Record pp. 77, 80), and the demurrers were sustained by the **nisi prius** court (Record p. 81); the plaintiff in error declined to further amend the complaint and a final judgment in favor of the defendant in error was rendered (Record pp. 82, —); from this judgment an appeal was taken to the Supreme Court of Alabama, it being the court of final resort in said State (Record pp. 82, —); the protection of said several provisions of the Constitution of the United States was there claimed and insisted upon by proper assignments of error and in argument; the Supreme Court, by its judgment, sustained the judgment of the **nisi prius** court and held said Act to be valid (Record pp. 86, —). A re-hearing was applied for and refused, and a writ of error to this court obtained (Record pp. 108, 110-1).

SPECIFICATION OF ASSIGNMENTS OF ERROR.

This suit was brought to recover an amount collected by the defendant in error as a franchise tax assessed against plaintiff in error as a foreign corporation, and the amount of the tax assessed was in proportion to the capital employed in the State of Alabama by plaintiff in error. A copy of the Act under which the tax was assessed has heretofore been set out in the statement of the case in this brief.

While Sections 1169 and 1170 of the Code of Alabama of 1896 and the Acts of the Legislature from which such sections were codified, were in force, plaintiff in error purchased under and in accord with the provisions of such sections, the property and franchise of several railroad corporations organized under the laws of Alabama. (Record pp. 11 to 17, inclusive; 42-52, inclusive; 65-70, inclusive.)

Copies of sections 1169 and 1170 of the Code of 1896 are set out in the statement of the case.

Among the franchises purchased by plaintiff in error

from domestic corporations were franchises to operate railroads in Alabama with the properties purchased from such domestic corporations (Record pp. 40, 57, 71).

Plaintiff in error claims in its complaint that the Act under which the tax (sought to be recovered) was assessed, impairs the obligations of its contracts arising out of said several purchases of the properties and franchises of domestic corporations, and, therefore, violates Article 1, Section 10, of the Constitution of the United States.
(Record pp. 17, 52, 56.)

Defendant in error demurred to the complaint upon the ground that it did not show that the Act of the legislature complained of violated said section of the Constitution of the United States (Record p. 78). The court of original jurisdiction sustained the demurrer, and its judgment was affirmed by the Supreme Court of Alabama (49 So. R., 404-412; Rec. pp. 87-99). By said decision the Supreme Court of Alabama held that the Act under which the tax was assessed did not violate the obligations of the contracts arising out of the purchases by plaintiff in error of the properties and franchises of said domestic corporations.

The first assignment of error is as follows:

> 1. In and by the complaint filed in said cause and the demurrers of the defendant thereto, there was drawn in question the validity of an Act of the Legislature of the State of Alabama, approved March 7, 1907, entitled
>
> "AN ACT to provide for the Revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax,"
>
> as violative of Section 10, Article I, of the Constitution of the United States, in that
>
> a. It violated the obligations of certain contracts between the plaintiff in error and the State of Alabama, arising out of the purchase by the plaintiff in error of the properties and franchises of certain domestic railroad corporations of the State of Alabama, and in that
>
> b. It violated the obligations of certain contracts between plaintiff in error and certain railroad corpora-

tions organized under the laws of the State of Alabama, arising out of the sale by such Alabama corporations of their property and franchises to the plaintiff in error, the Louisville & Nashville Railroad Company, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and does not violate Section 10 of Article I of the Constitution of the United States.

Plaintiff in error in and by its complaint further claimed that said Act of the Legislature under which the tax sought to be recovered was assessed, deprived it of its property without due process of law, and denied to it the equal protection of the laws, in that it imposed arbitrary burdens upon it not imposed upon individuals or domestic corporations engaged in the same business under like circumstances. (Record pp. 18, 57, 61, 62.)

Defendant in error demurred to the complaint because it failed to show that the Act under which the tax was assessed violated the Constitution of the United States. (Record p. 76.) The court of original jurisdiction sustained the demurrer, and its rulings were affirmed by the Supreme Court of Alabama.

By said decision the Supreme Court of Alabama held that said Act of the Legislature did not deprive plaintiff in error of its property without due process of law, and did not deny to it the equal protection of the laws, and did not violate the Fourteenth Amendment of the Constitution of the United States.

The second assignment of error is as follows:

2. In and by the complaint filed in said cause, and the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff in error, the Louisville & Nashville Railroad Company, of its property without due process

of law, and denies to it the equal protection of the laws, in that said Act imposes upon the plaintiff in error, the Louisville & Nashville Railroad Company, which was and is a person within the jurisdiction of the State of Alabama, burdens not imposed upon corporations organized under the laws of said State, and engaged in a like business under the same circumstances, and in and by affirming the judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and does not violate the provisions of the said Section of the Fourteenth Amendment of the Constitution of the United States.

The complaint alleges that plaintiff in error was engaged in the business of a common carrier, both of interstate and intrastate commerce (Record pp. 42, 59); that it had the right and was bound both by the franchises it purchased from domestic corporations and by the constitution and laws of Alabama to do an intrastate, as well as an interstate, business, and that the act complained of constituted an interference with the regulation by Congress of interstate commerce, and is, therefore, violative of the federal constitution and void. Defendant in error demurred to the complaint upon the ground that the facts alleged in the complaint do not constitute a regulation of, or a direct burden upon the interstate commerce in which plaintiff in error was engaged, and do not constitute an interference with the powers of Congress to regulate commerce among the several States, and are not in violation of Section 8 of Article I of the Constitution of the United States. (Record p. 80.)

The court of original jurisdiction sustained the demurrer and the Supreme Court of Alabama affirmed its judgment.

By its said decision the Supreme Court of Alabama held that said Act did not constitute an interference with the regulations by Congress of or an undue burden upon the interstate commerce in which plaintiff in error was engaged, and did not violate section eight of Article One of the Constitution of the United States.

The third assignment of errors is as follows:

> 3. In and by the complaint filed in said cause and the demurrer of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, in that said Act operates as an interference with the regulation of Interstate Commerce by Congress, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that the said Act of the Legislature of the State of Alabama is valid and does not constitute an interference with the regulation of Interstate Commerce by Congress.

There is appended to this brief

1. A summary of the points made and authorities cited in the argument that follows.

2. A copy of the dissenting opinion of Judge Anderson of the Supreme Court of Alabama.

ARGUMENT.

I

OBLIGATION OF CONTRACTS.

The Act creating the tax is violative of Section 10, Article I, of the Constitution of the United States.

The first assignment of error (Rec. p. 112) reads as follows:

> "1. In and by the complaint filed in said cause and the demurrers of the defendant thereto, there was drawn in question the validity of an Act of the Legislature of the State of Alabama, approved March 7, 1907, entitled
>
> 'An Act to provide for the Revenue of the State, by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax,'
>
> as violative of Section 10, Article I, of the Constitution of the United States, in that
>
> a. It violated the obligations of certain contracts between the plaintiff in error and the State of Alabama, arising out of the purchase by the plaintiff in error of the properties and franchises of certain domestic railroad corporations of the State of Alabama, and in that
>
> b. It violated the obligations of certain contracts between plaintiff in error and certain railroad corporations organized under the laws of the State of Alabama, arising out of the sale by such Alabama corporations of their property and franchises to the plaintiff in error, the Louisville & Nashville Railroad Company, and by affirming said judgment of the City Court of Montgomery, the Supreme Court of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and does not violate Section 10 of Article I of the Constitution of the United States."

All of the allegations of the complaint are, of course, admitted by the demurrer to be true; in our argument, therefore, we shall speak of the matters alleged as facts.

The State of Alabama by special act of the legislature chartered several common carrier railroads, and several other common carrier railroads were organized under the general incorporation laws of Alabama. These several corporations are named in the third count (Rec. pp. 11 to 18) and in counts A to M both included (Rec. pp. 43 to 74).

When a corporation is organized under a special act, its rights, powers and duties are, of course, contained in such act, and when a corporation is organized under general laws, its rights, powers and duties are prescribed by such general laws.

In Granger Life & Health Ins. Co. vs. Kamper, 73 Ala., 342, it is said:

> "Of every corporation formed under the general law, the law itself becomes the charter, defines and enumerates the powers which are to be exercised, the nature and extent of corporate franchises and privileges."

And in Bibb vs. Hall & Farley, 101 Ala., 98, it is said:

> "Generally speaking, the rights of a corporation are determined by the law in force when it came into being."

Each of the corporations whose property rights and franchises were purchased by plaintiff in error, had the right to own a railroad in Alabama, and to conduct therewith both an interstate and intrastate common carrier business, and their charters, in the absence of some right reserved by the State to repeal or amend them, became and were contracts between said several corporations and the State of Alabama that could not be impaired by the State.

> Dartmouth College vs. Woodward, 4 Wheat., 518.
> State of Alabama vs. Bible Soc., 134 Ala., 634.

This is true whether such corporation were created by special charter or organized under a general law.

Salt Co. vs. East Saginaw, 13 Wall., 378.
Stanilaus Co. vs. San Joaquin C. & I. Co., 192 U. S., 206.

If then, the State had attempted to impose any special burden upon the power and franchise, it granted to the domestic corporations whose property and franchises were purchased by plaintiff in error, to do an interstate or an intrastate common carrier business in Alabama, the Act by which this was attempted would have been void, unless at the time the right was granted there was in the Constitution of the State a reserved right to impose such burdens. Defendant in error claims that this right was reserved in two sections of the Constitution of Alabama of 1901, viz.: 22 and 238.

Section 22 of that Constitution reads as follows:

> "Sec. 22. That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment."

And Section 238 of that Constitution reads as follows:

> "Sec. 238. The legislature shall have the power to alter, amend or revoke any charter of incorporation now existing and revocable at the ratification of this constitution, or any that may be hereafter created, whenever, in its opinion, such charter may be injurious to the citizens of this state, in such manner, however, that no injustice shall be done to the stockholders."

In the opinion of the Supreme Court of Alabama in this case (Rec. p. 94), it is held that by section 22 of the Constitution of Alabama of 1901, or section 23 of Article I of the Constitution of 1875, the State reserved the absolute right to alter, amend or repeal any franchise granted by it and, therefore, had the right to repeal the right granted by it to do an intrastate business in Alabama. It did not hold that the

State had the right under Section 10 of Article 14 of the Constitution of 1875, or Section 238 of the Constitution of 1901, to impose such additional burden upon the franchise to do an intrastate common carrier business while in the hands of domestic corporations from whom plaintiff in error purchased such franchises, nor even in the hands of plaintiff in error; it confined itself to declaring that Section 23 of Article I of the Constitution of 1875 authorized the revocation of the right to do an intrastate business granted to foreign corporations.

The domestic corporations, or, at least, most of them, from whom plaintiff in error acquired its property, rights and franchises, were created prior to the Constitution of 1901 (Rec. pp. 11 to 18, 43 to 74), and held such rights, privileges and franchises subject only to the provisions of the Constitution in existence when the rights, privileges and franchises were acquired, and said railroad property rights and franchises were acquired by plaintiff in error as its complaint shows prior to the State Constitution of 1901.

Granger Life & Health Ins. Co. vs. Kamper, 73 Ala., 242, supra.

The Mobile & Montgomery Railroad Company acquired (by consolidation of two other corporations) its franchise to do an intrastate business in Alabama in 1868 (Rec. p. 12), and mortgaged the same in 1870. The mortgage was foreclosed and the property and rights purchased and the purchasers organized the Mobile & Montgomery Railway Company, and this Company sold and conveyed its property and franchises to plaintiff in error in 1900. The rights and franchises of the Mobile & Montgomery Railway Company were, therefore, held subject to the Constitution of Alabama of 1868. The other domestic corporations whose properties, rights and franchises were purchased by plaintiff in error were acquired under the Constitution of 1875.

Section 24 of the Constitution of Alabama of 186
vided

"That no **ex post facto** law, nor any law imp
the obligation of contracts, shall be made."

This section was enlarged and carried into the Co
tion of Alabama of 1875 as Section 23 of Article I in t
lowing language:

"That no **ex post facto** law or any law impairi
obligation of contracts **or making any irrevocable**
of special privileges or immunities, shall be passed
general assembly."

And this section was still further enlarged and
into the Constitution of 1901 as section 22 in the fol
language:

"That no **ex post facto** law, nor any law, im
the obligations of contracts, or making irrevoca
exclusive grants of special privileges or immunitie
be passed by the legislature; **and every grant of**
chise, privilege or immunity shall forever remain
to revocation, alteration or amendment."

The words added in each successive Constitution
derscored by us.

Section 10, Article 14, of the Constitution of 18
section 238 of the Constitution of 1901 each provides
lows:

"The legislature shall have the power t
amend, or revoke any charter of incorporation no
ing and revocable at the ratification of this Cons
or any that may be hereafter created, whenever
opinion, such charter may be injurious to the citi
this State, in such manner, however, that no i
shall be done to the stockholders."

There is no similar provision in the Constitution
The Mobile & Montgomery Railway Company
been organized when the constitution of 1868 was in

COPY BO

necessarily follows that its powers, rights and franchises were not subject to alteration, amendment or repeal.

The other corporations whose property, rights and franchises were purchased by plaintiff in error were organized while the Constitution of 1875 was in force, and it may, therefore, be well to determine the effect of the foregoing provision upon their rights and franchises.

The Supreme Court of Alabama has not, other than in the case under discussion, construed these provisions of the Constitution in their application to a question like the one now in hand, but had it done so, such construction would not be binding upon this court, for when the question under consideration is whether an act of the legislature of a state is violative of the contract clause of the federal constitution, this court will construe the contract, and all legislation affecting it, for itself, wholly independent of any construction that may have been placed upon it by the Supreme Court of the State.

Douglas vs. Kentucky, 168 U. S., 500.

Vicksburg vs. Vicksburg Water Works Co., 202 U. S., 467.

Powers vs. Detroit & Grand Haven Rwy., 201 U. S., 556.

It is true that in the case of Hammond Packing Company vs. Arkansas, 212 U. S., 345, a provision of the Constitution of Arkansas, reserving to the State the power to repeal, alter and amend charters granted by it, was under discussion, and this court says with reference thereto, that

> "Besides, it is not disputed that the State under its constitution had a reserve power to repeal, alter and amend charters by it granted, and therefore, even if the impossible assumption was indulged that the grant of the power to do business implied in the absence of such reservation the right to carry on the business in violation of a lawfully regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an irrepealable contract cannot be predi-

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cated upon a contract which is repealable. Citizens' Savings Bank vs. Owensboro, 173 U. S., 636, 644. And no support for the contrary view arises, because the Constitution of Arkansas exacted that the authority to repeal, alter and amend should be exercised, 'in such manner, however, that no injustice be done to the corporators.' The determination whether the power to repeal, alter or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States."

This proposition had been contended for in the brief of the defendant in error in that case, but was not supported by the citation of any authority (page 328). It does not seem to have been discussed in the brief of the plaintiff in error, and as it was not a vital question, it appears to have been tacitly conceded by it. It is announced by the court, without discussion or reference to authority, and is not necessary to the determination of the cause; in fact, that branch of the cause had already been disposed of upon other points.

This enunciation seems to us to be in conflict with the doctrine recognized in Douglas vs. Kentucky, 168 U. S., 501, and supported by an array of authority cited therein, as well as by the other cases cited in this brief, supra.

Section 10, Article 1, of the Constitution of the United States prohibits any state to pass any law impairing the obligations of any contract, and this court has jurisdiction to finally determine whether this provision of the Constitution has been violated. To do this, it must necessarily determine whether such a contract exists, what the terms of such contract are, and the obligations springing therefrom, and whether the State has passed a law violating such obligations. Where a corporate charter is granted by a State having such a provision in its Constitution, one of the terms of the contract is that the corporation shall retain all of the

franchises conferred upon it, the repeal of which would do injustice to the incorporators. To ascertain whether an act of the legislature impairs the obligation of a contract, it must necessarily be determined whether any franchise was granted, what that franchise is, and whether the act complained of impairs it. The grant of the franchise is rarely disputed. The sole question is, has the contract been impaired; not whether the franchise has been altered or repealed, but whether it has been altered or repealed in a manner or under circumstances not authorized by the terms of the contract—that is, so as to do injustice to the incorporators. This, it is respectfully submitted, is the heart of the question here presented to this court for determination, and if it is remitted to the adjudication of the State Courts, the jurisdiction of this court over questions involving the obligations of contracts is without efficacy.

In Jefferson Branch Bank vs. Skelly, 1 Black, 436, 443, it is said:

> "Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the United States follow the construction of the Supreme Court of a State in such matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

What are "grants of special privileges and immunities"

within the meaning of section 23 of Article I of the Constitution of Alabama of 1875 has never been determined by the Supreme Court of Alabama. We have found no definition of these terms that is of universal application; we may concede that they are broad enough to cover franchises and rights granted to corporations.

Monro vs. People, 99 Ill., 80,

and that under the Constitution of 1875 the legislature could not make any irrevocable grant of a franchise; but it does not follow that the legislature may, under the Constitution of 1875, revoke at will the grant of any franchise it may have made to a corporation. If a franchise is revocable upon certain contingencies, then it is not irrevocable, although the State may not have the right to revoke it at will. Under such a provision it may be revoked only for causes prescribed by valid laws.

Mayor etc. of Houston vs. Houston City Rwy. Co.,
19 S. W. Rep., 129.

That this is the true construction of this section is made manifest by the provisions of Section 10 of Article 14 of the same constitution, where it is provided that

> "The legislature shall have the power to alter, amend or revoke any charter of incorporation * * * whenever in its opinion such charter may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the stockholders."

To hold that under Section 23, Article I, any franchise can be capriciously revoked, would bring it directly in conflict with the limitations contained in Section 10 of Article 14. And in that event the provisions of the last section would control for two reasons:

1st: Because Section 23, Article I, is a general provision, applying to all special privileges and immunities, while

Section 10, of Article 14, makes special provisions applicable to charters of corporations.

State vs. Inhabitants of Trenton, 38 N. J. L., 64.

2nd: Because the provisions of Section 10, Article 14, are subsequent in order to Section 23, Article 1.

Hand vs. Stapleton, 135 Ala., 162.

It is submitted, therefore, that the several franchises to own railroads and to operate them, both in an interstate and intrastate common carrier business, while in the hands of the domestic corporations could not, at the will of the State, have been arbitrarily taken from them under Section 23 of Article I of the Constitution; and if it would necessarily have worked an injustice to stockholders to take them, they could not be taken under Section 10 of Article 14 of the Constitution of 1875.

Vicksburg vs. Vicksburg Water Works, 202 U. S., 465.

Even where a corporation is organized under a general corporation law, and there is a provision authorizing the alteration, annulment or repeal of such general law, the right to repeal franchises obtained under such general laws is not without limitation; "such alteration must be reasonably made in good faith and consistent with the scope and object of the act of incorporation."

Stanilaus County vs. San Joaquin C. & I. Co., 192 U. S., 213.

And the State could not, under this reserved right, take away or destroy rights which by a legitimate use of the powers granted have become vested in the corporation.

Miller vs. State, 15 Wall., 498.

In this case, there has been no effort made by the State

to alter, amend or revoke this franchise; the act under discussion simply attempts to place an unjust burden upon it.

In American Smelting Co. vs. Colorado, 204 U. S., 114, referring to a similar act, the court says on page 114:

> "The act does not alter the charter or annul or amend it. It simply increases the taxation, which up to the time of its enactment had been imposed on all foreign corporations doing business in the State."

Even if it had the right to alter, amend or repeal the charters, the State could not deny to the corporations the equal protection of the law by imposing upon them arbitrary burdens not placed upon other persons within its jurisdiction and engaged in the same business under the same circumstances.

> S. & N. Ala. R. R. Co. vs. Morris, 65 Ala., 193.
> Gulf Col. & Santa Fe Rwy. vs. Ellis, 165 U. S., 151.
> Phoenix Carpet Co. vs. State, 118 Ala., 143.
> City Council of Montgomery vs. Kelly, 142 Ala., 557.
> Cotting vs. Kansas City Stk. Yds., 183 U. S., 102.
> Magoun vs. Ill. Trust & Sav. Bk., 170 U. S., 293.

It is, therefore, submitted that had the State attempted to impose any arbitrary terms upon the exercise by the original corporations of these franchises, it would thereby have impaired the obligation of the contracts between the State and the corporations arising out of the grants by the State, and the acceptance by the corporations of these franchises, and that such effort would have violated the provisions of Section 10, Article I, of the Constitution of the United States.

Had the several domestic corporations sold their properties, rights and franchises to plaintiff in error under provisions in their several charters granting the franchises to them **and their assigns,** there can be no question but that the State's contracts would have passed to the plaintiff in error and have been as inviolable in its hands as they were in the hands of the original corporation. Such was the case, and it was so held in

Vicksburg vs. Vicksburg Water Works, 202 U. S., 465.

See also

Port of Mobile vs. L. & N. R. R. Co., 84 Ala., 115.
Wilmington vs. Read, 13 Wall., 267.
Pennsylvania College Cases, 13 Wall., 212.
Williamette vs. Bank, 119 U. S., 191.

The powers granted to the domestic corporations were not granted to them **and their assigns,** and were not, under their original charters, transferrable by them, but the effect of sections 1169 and 1170 of the Code of Alabama of 1896 was to authorize the domestic corporations to sell and convey their property, rights and franchises to foreign corporations and was amendatory of their charter rights.

L. & N. R. R. Co. vs. State, 45 So. Rep., 302.

By purchases made under these sections, the plaintiff in error, therefore, became the owner of the contract between the State and the corporations to which the grants were originally made as fully as if the franchises had been granted to the original corporations and their assigns.

In the case of Erie Railroad vs. Pennsylvania (153 U. S. 628), Pennsylvania, by an act of the legislature, authorized a New York railroad corporation to build its road through the State of Pennsylvania, and after the railroad was built, undertook to require it to pay the tax levied upon its bonds and stock owned by citizens of Pennsylvania when paying interest in the City of New York upon script bonds or certificates of indebtedness owned by such citizens. The court says: (P. 641)

> "The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie & Western Railroad Company is a private corporation of another State; that it has no right to do business in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be pre-

scribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. This view was expressed by the Supreme Court of Pennsylvania in Commonwealth vs. New York, Lake Erie & Western Railroad, 129 Penn. St., 463, 476, in the following language: 'It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The Legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition implied even in the case of domestic corporations, that they will be subject to such reasonable regulations in respect to the conduct of their affairs, as the legislature may from time to time prescribe, and such as to not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted. Chicago Life Insurance Company vs. Needles, 113 U. S., 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this State as a matter of grace and not of right?'"

* * * * * * *

"It is found as a fact in this case, that so far as Pennsylvania is concerned, the business of the railroad company consists chiefly in the transportation of freight and passengers from or to other States, into, out of, or through that State. We are not sure that the court below, or counsel here, intended to be understood as claiming that it was competent for Pennsylvania to make compliance with the fourth section of the act of 1885 a condition of the right of the railroad company to continue the use of its track in Pennsylvania for purposes of interstate commerce. Some of the considerations neces-

sary to be borne in mind, when any such question arises for determination, are adverted to in the recent decision of this court in Crutcher vs. Kentucky, 141 U. S., 47, 59. But no such question is here presented. The Commonwealth of Pennsylvania has not attempted to impose any such condition upon the corporations embraced by the statute of 1885.

Assuming, for the purposes of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case and need not be repeated. When the State, by the acts of 1841 and 1846, gave this as the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts, was not overlooked; for, by the seventh section of the act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges and provisions contained in the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved. "If the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges (provisions) of this act. And the question whether the privileges granted had been misused or abused, or the provisions of the act violated, was to be determined by **scire facias** issued out of the Supreme Court of Pennsylvania, Sec. 7. There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the

assent which it gave upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and properly situated within its limits.

It is contended by the defendant in error that sections 1169 and 1170 of the Code of 1896 merely conferred a license or privilege upon the plaintiff in error that there was no consideration moving to the State for the right, and, therefore, no element of a contract. The only consideration moving from any corporation to which a charter is granted is the acceptance of the grant and the assumption of the duties thereunder, but this constitutes a good consideration for the making of the contract by the State.

In State of Alabama vs. Alabama Bible Society, 134 Ala., 634, it is said:

"The grant of appellee's charter and its acceptance was unqualified, and effected a contract between the State and the appellee such as came within the meaning of that part of section 10, Article I, of the Federal Constitution which prohibits the State to pass any law impairing the obligation of contracts. The doctrine so controlling is too well established and familiar to require an extended citation of authorities here. See the leading case of Dartmouth College vs. Woodward, 4 Wheat. (U. S.) 518; also The Binghampton Bridge, 3 Wall., 51; Home of the Friendless vs. Rouse, 8 Wall. 431; St. Anna's Asylum vs. New Orleans, 105 U. S. 362; Daughdrill vs. Ins. Co., 31 Ala. 91; Tuscaloosa, etc., Asso. vs. Green, 48 Ala. 346; Ala. & Fla. R. Co. vs. Burkett, 46 Ala. 569.

In Cooley's Constitutional Limitations it is well said of charters of private corporations generally that they 'are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and

duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property, or valuable thing unless the right to do so is reserved in the charter itself.' This quotation was used approvingly in Mayor, etc., v. Ins. Co., 53 Ala. 570.

The contractual element of consideration for the exemption was supplied when the charter was accepted and acted under. Acceptance of the charter being shown, the existance of a consideration for the exemption is presumed and it is unnecessary to inquire whether the passage of the act was induced by any actual benefit received by or expected to accrue to the State.— Daughdrill Case, supra; Home of the Freindless v. Rouse, supra, and authorities there cited."

By the purchase of the property, rights and franchises of the domestic corporation, the plaintiff in error assumed the duties incident thereto of operating a common carrier railroad of interstate and intrastate commerce, and thereby gave the same consideration for a transfer to it of the franchises that the original companies gave for the grant thereof.

To support their contention defendant in error relies upon the case of Wisconsin & Michigan Rwy. Co. v. Powers, 191 U. S., 385. That case was one in which there was a statute prescribing a tax, but providing that the tax prescribed by that law, or any other law of the State should not apply to any railway or railroad company thereafter building or operating a line of railroad within the State north of parallel forty-four of latitude until the same should be operated for ten years; a railroad, subsequently built, claimed that this act constituted a contract exempting it from such taxes, and that the repeal of the act violated the obligation of such contract. The court says:

"In the case at bar, of course, the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other ele-

ments were present. But the other elements are that
promise and the detriment are the conventional indu
ments each for the other. No matter what the act
motive may have been, by the express or implied ter
of the supposed contract, the promise and the conside
tion must purport to be the motive each for the oth
in whole or at least in part. It is not enough that
promise induces the detriment, or that the detriment
duces the promise if the other half is wanting. If we
to deal with this proviso in a general tax law as we sho
deal with an alleged simple contract, while no doubt
some cases between private persons the above disti
tions have not been kept very sharply in mind, Mar
v. Meles, 179 Massachusetts, 114, 117, it is clear that
should require an adquate expression of an actual int
on the part of the State to set change of position agai
promise before we hold that it has parted with a gr
attribute of sovereignty beyond the right of change. S
Vicksburg, Shreveport & Pacific Railroad v. Dennis, 1
U. S., 665, 668. Looking at the case in this way, then,
find no such adquate expression. No doubt the St
expected to encourage railroad building, and the railro
builders expected the encouragement, but the two thin
are not set against each other in terms of bargain. S
Covington vs. Kentucky, 173 U. S., 231, 238, 239."

Defendant in error claims that this language is applica
to the case at bar; that a general law conferring rights a
powers upon corporations is a mere act of prophesy, o
couragement of bounty, even after it has been acted up
by the corporation. That this contention is not support
by this case is made clear by the consideration of one of t
cases cited and relied upon by the court.

In Salt Co. v. East Saginaw, 13 Wall., 378, the Co
says:

"Charters granted to private corporations are held to be contracts: powers and privileges are conferred by the State, and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties; and, so corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. 'The act is as special to each bank,' says Justice McLean, delivering the opinion of this court, 'as if no other institution were incorporated under it.' (Piqua Bank v. Knoop, 16 How. 380.) In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existance of any corporation formed under the act, the stipulation or exemption specified in it is to operate."

Whitman v. Oxford Nat. Bank, 176 U. S., 563.
Bernheimer v. Converse, 206 U. S., 529.
Powers v. Detroit & Grand Haven Rwy., 201 U. S., 556.

By a **general** act of the legislature passed May 5, 1884, the State of Kentucky, to encourage the building of railroads, exempted all railroads which might be built in that State under existing charters, or charters which might thereafter be granted from all taxation under the laws of that State for a period of five years from the date of the beginning of the construction of such new railroads. This act was repealed thereafter by a general revenue act which took effect September 14, 1886. Before the passage of either of these acts, the legislature of that State had passed, in 1856, an act reserving the right to repeal or amend all charter privileges thereafter granted by the legislature. In the case of **Commonwealth v. Railroad Companies, 85 Ky. 60**, the Court of Appeals of Kentucky held that the legislature had no power to with-

draw the exemption from those who had expended their money by commencing the construction of new railroads, upon the assurances of the said act of May 5, 1884, after that date and prior to the repeal of that act on September 14, 1886, and that the reservation act of 1856 (which is similar to the reservation contained in Section 238 of the Alabama Constitution) had no application to the act of 1884 granting such exemption from taxation.

The following passage from the opinion in that case furnishes an instructive view, at least, of some of the questions involved on this appeal (Ib. pp. 74-5):

> "It is contended that the exemption act is a mere bounty, which the State may withdraw at pleasure; and more than that, that even if the act to encourage the appellees to construct their roads be regarded as forming a contract with the State of an obligatory character, yet the power reserved to the state by the law of 1856 authorized any change in the contract desirable by the State, or even its entire revocation. Quoting from Tomlinson v. Jessup, 15 Wallace, 454, a leading case on the subject under consideration, counsel contend that 'immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of the power such as is contained in the law of 1841 (here 1856), subject to be revoked, equally with any other provision of the charter, whenever the legislature may deem it expedient for the public interest that the revocation shall be made.'
>
> It is sufficient to say of this proposition, which even at first blush strikes one as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law, and affected alike all who accepted its provisions or acted on the strength of them. No contract was made with any person, natural or artificial, upon the adoption of this act; though by accepting its terms certain rights might be secured under the nature of contract rights.

> But no reservation, express or implied, can be said to have been made therein by virtue of the act of 1880. Being a general law it was revocable at pleasure; but it does not follow that it might be revoked so as to injuriously affect the citizens accepting its provisions, in violation of the pledge of the State and the common principals of justice. The State, to promote the ends of development, to afford greater facilities for transportation, and to bring into its borders an increased volume of property, shortly to help bear the common tax burden, says to the railroad people, build up your enterprises and spend your capital in our midst, and in consideration of the premises we will grant you a brief respite from the tax gatherer! We think the State cannot withdraw its pledge of immunity from those who acted upon the assurances of this act, and that the property of the appellees beginning their work prior to the repealing act of September 14, 1880, and thus accepting the provisions of the act of 1884, while it was in force cannot be subjected to the taxation sought to be imposed in these actions."

We submit, therefore, that the several domestic corporations whose properties, rights and franchises were sold to plaintiff in error because assignable under section 1169 and 1170 of the Code of Alabama of 1896, and the contracts between the several domestic coporations and the State of Alabama by such assignments became binding as contracts between the plaintiff in error and the State of Alabama, and could not be altered, amended or repealed because injustice would thereby be done to the stockholders of plaintiff in error. The State could place no arbitrary burdens on them in the hands of the plaintiff in error that it could not have placed upon them in the hands of the corporations assigning them to it, and it is immaterial whether this was expressly so provided in sections 1169 and 1170 or not.

The question then is, does the imposition of an arbitrary tax not imposed upon domestic corporations or others engaged in a like business under the same or similar conditions, violate the obligation of the contract with the plaintiff in error that it shall have the right to do both an interstate and

an intrastate common carrier business in Alabama. This is exactly what was decided in the affirmative in the case of the American Smelting Co. vs. Colorado.

As a matter of fact, section 1169 does expressly provide that

> "Such railroad, so purchased or leased, shall be in all respects subject to the laws of this State as if owned by a domestic corporation."

The provision of the statute of Colorado was:

> "Such corporation shall be subject to all of the liabilities, restrictions and duties which are, or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Speaking of this provision the Supreme Court, in American Smelting Co. v. Colorado, 204 U. S., 113, says:

> "It was a clear contract that the liabilties, etc., should be the same as the domestic corporation and the same treatment in that regard should be measured out to both."

The Supreme Court of Alabama first held that the tax under consideration was a property tax, but upon an application by defendant in error it withdrew that opinion and held the tax to be a privilege or occupation tax. Plaintiff in error acquired some small part of its property otherwise than under sections 1169 and 1170 of the Code of 1896, and defendant in error claims that even if it violated the obligation of contracts to impose the tax upon the property and franchises acquired under those sections, still the tax may be imposed upon the other part of the business of plaintiff in error, and as it is a mere occupation tax, it may be measured by any standard the State may select, and that the fact that the value of the entire property used by the plaintiff in error in Alabama is selected as such measure, and the further fact that the tax could not

be placed upon that part of the business of plaintiff in error conducted with the property and under franchises obtained by it from domestic corporations can make no difference. If this be conceded to be true (which it is not) it has no application to the case in hand. The statute imposes the tax upon the **whole business** done by foreign corporations, and not upon any part thereof, and it measures the tax by the whole of the actual capital employed in such business. Had plaintiff in error done no business with the property and under the franchises obtained from the domestic corporations, it would not, under the statute, have been liable for the tax assessed against it, but only for a tax based upon the smaller capital actually used in the State, and had it done business with no other property, and under no other franchises than those obtained from domestic corporations, it would still have been required to pay upon the value of its property so used. The act under consideration provides that every foreign corporation shall pay the tax. This provision is without qualification and the tax becomes due January 1st of each year. The act further provides that no corporation required to pay the tax shall do any intrastate business in Alabama unless it shall have paid the tax within sixty days after it becomes due. This last provision constitutes a penalty for a failure to pay the tax, but does not deprive the State of the right to collect the tax. In addition to imposing this penalty, the State can sue for and recover the tax if the law is valid.

State vs. Fleming, 112 Ala., 179.

The tax becomes due January 1st of each year, and can at any time thereafter, either before or after the expiration of sixty days, be recovered by suit, and the fact that the Company is excluded from doing an intrastate business in Alabama either before or after suit is begun could not affect the right of recovery.

Such a tax upon the privilege of doing a business, even though the business be severable in its character, is a tax

upon the business as a unit and must be held void as applied to any part thereof.

Picard vs. Pullman Co., 117 U. S., 34.
Allen vs. Pullman Co., 191 U. S., 177.

The effect of the law is, therefore, necessarily to impose a burden upon the use of the property and the enjoyment of the franchises purchased by plaintiff in error from domestic corporations, and the provisions of the Constitution of the United States cannot be evaded by the name under which the burden is imposed.

Galveston Harrisburg, etc., Rwy. Co. vs. Texas, 210 U. S., 227.
Wilmington R. R. Co. vs. Reid, 13 Wall., 264.

Even if the purchase by plaintiff in error of the property and franchises of the domestic corporation had not operated to create contracts between the plaintiff in error and the State, measured by the terms of the franchises transferred, still there would be lawful contracts entered into between the domestic corporations and plaintiff in error whereby the domestic corporations sold and transferred their franchises to the plaintiff in error and by which plaintiff in error became vested with such franchises. Such franchises constitute property and the imposition of unreasonable, unequal and arbitrary burdens thereon, to which they would not be subject in the hands of the domestic corporations, is a violation of the obligations of the contract of sale made by the domestic corporation.

Green vs. Biddle, 8 Wheat. 1.
Von Hoffman vs. City of Quincy, 4 Wall., 549.

It was contended by defendant in error that it is not sufficiently shown by the complaint that plaintiff in error had the charter power to purchase the property and franchises of

domestic corporations. The allegations of these powers are substantially the same that were made in the pleas filed in the case of the State of Alabama at the relation of Henry B. Gray against the plaintiff in error, and were held sufficient.

L. & N. R. R. Co. vs. State, 45 So. Rep., 206.

But if this was not so, still the doctrine of **ultra vires** has no application to an executed contract.

Bigbee & W. R. Pack. Co. vs. Moore, 121 Ala., 382.

It was also contended that the assent of the stockholders of the domestic corporations to the sale of their properties and franchises must be alleged, but the absence of such consent cannot be set up by the State.

L. & N. R. R. Co. vs. Gray, 45 So. Rep., 306.
West Point R. R. Co. vs. Allen, 143 Ala., 547.
Barrett vs. Pollak, 108 Ala., 306.
Ala. Iron & Steel Co. vs. McKeever, 112 Ala., 134.

II

EQUAL PROTECTION OF THE LAWS.

The second assignment of error reads as follows:

"2. In and by the complaint filed in said cause, and the demurrers of the defendant in error thereto, there was drawn in question the validity of said Act of the Legislature of the State of Alabama, as violative of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff in error, the Louisville & Nashville Railroad Company, of its property without due process of law, and denies to it the equal protection of the laws, in that said Act imposes upon the plaintiff in error, the Louisville and Nashville Railroad Company, which was and is a person within the jurisdiction of the State of Alabama, burdens not imposed upon corporations organized under the laws of said State, and engaged in a like business

under the same circumstances, and in and by affirming the judgment of the City Court of Montgomery, the Supreme Court of the State of Alabama erroneously held and adjudged that said Act of the Legislature of the State of Alabama is valid, and does not violate the provisions of the said Section of the Fourteenth Amendment of the Constitution of the United States.

Among other things, the Fourteenth Amendment provides that

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute under consideration clearly denies to foreign corporations doing business in the state the equal protection of the laws; it places upon them a burden not placed upon individuals or domestic corporations, doing the same kind of business under the same circumstances. Such a tax, by the State, if applicable to "a person within its jurisdiction," within the meaning of the Fourteenth Amendment of the Constitution of the United States, is clearly violative of that provision.

> Raymond vs. Chicago Co., 207 U. S., 35.
> Connolly vs. Union Sewer Pipe Co., 184 U. S., 558.
> Cook vs. Marshall Co., 196 U. S., 274.
> Corting vs. Kansas City Stock Yds., 183 U. S., 105.

A state may tax certain property, or certain callings, so long as there is no arbitrary discrimination against persons engaged in such calling under like circumstances.

> Armour Packing Co. vs. Lacy, 200 U. S., 235.
> Kehrer vs. Stewart, 197 U. S., 60.
> Home Ins. Co. vs. New York, 134 U. S., 606.
> Magoun vs. Ill. Trust & Savings Bk., 170 U. S., 293.

But when a law imposes arbitrary burdens upon one set

of persons, or corporations within the jurisdiction of the State, not imposed upon others, and not justified by the character of the business in which such persons or corporations are engaged with reference to such burdens, so as to form a just basis for their imposition, it denies to such persons or corporations the equal protection of the laws, and is in conflict with the Fourteenth Amendment of the Constitution of the United States.

S. & N. Ala. R. R. Co. vs. Morris, 65 Ala., 193.
Gulf, Colo. & Tenn. Rwy. vs. Ellis, 165 U. S., 151.
Phoenix Carpet Co. vs. State, 118 Ala., 143.
City Council of Montgomery vs. Kelley, 142 Ala. 557.
Cotting vs. K. C. Stock Yards, 183 U. S., 102.
Magoun vs. Ill. Tr. & Sav. Bk., 170 U. S., 293.

Neither the Supreme Court of Alabama nor counsel for the defendant in error contravert these propositions; on the contrary, they admit that the statute denies to plaintiff in error the equal protection of the law, and that it would be in violation of the Fourteenth Amendment of the Constitution of the United States, if applicable to non-resident persons, other than corporations. But they claim that, although a corporation is a person within the meaning of this provision of the Constitution of the United States, a foreign corporation, though actually within the jurisdiction of the State, as alleged and not denied, is not within its jurisdiction in that sense that entitles it to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

It is true that a foreign corporation when only within the jurisdiction of the State under a license, is not necessarily entitled to the protection of the Fourteenth Amendment of the Constitution of the United States against a denial to it by the State of the equal protection of the laws; and that the State may, if it can do so, **without violating any other provision of the Constitution of the United States**, arbitrarily withdraw its license to a foreign corporation to do business within

its jurisdiction, and may, therefore, deny to it the equal protection of the laws.

National Council U. A. M. vs. State Council, 203 U. S., 153.

It is said in Securities Mutual Life Ins. Co. vs. Prewitt, 202 U. S., 249:

> "A State has the right to prohibit a foreign corporation from doing business within its borders, **unless such prohibition is so conditioned as to violate some provision of the Constitution.**"

The plaintiff in error concedes these propositions to be established, but contends that the State cannot exclude it from its jurisdiction without violating two provisions of the Constitution, viz.: The due process provision of the Fourteenth Amendment, and the contract provision of Section 10, Article I, of the Constitution of the United States.

A railroad company cannot conduct its business without a railroad, and when a state permits a foreign railroad corporation to acquire in good faith railroads and to do business within its border, it necessarily consents to its acquiring property therein with which to conduct such business, and when a state grants a railroad corporation the right to acquire railroad property within its domain, and the company avails itself of the power granted to it, and acquires such railroads by the expenditure of millions of dollars, the refusal of the State to allow it to use such roads necessarily destroys the value of the property thus acquired, and to deny the corporation the right to use its road for intrastate business would also, to a great extent, destroy its value, and to do this would be to take the property of the corporation without due process of law.

In Ames vs. Union Pac. R. R. Co., 64 Fed., 177, it is said:

> "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors,

> Railroads are not like stages or steamboats, which if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and be put to use at other places, and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed."

In the case of the Securities Mutual Life Ins. Co. vs. Prewitt, *202 U. S., 257*, and in N. W. Life Ins. Co. vs. Riggs, *203 U. S., 255*, and again in Hammond Packing Co. vs. Arkansas, *212 U. S., 322*, it is held that a state may determine upon what terms a foreign corporation may be granted a license or permission to do business within its domain, and that a state does not, therefore, violate the federal constitution by imposing arbitrary burdens upon such foreign corporations.

In Smyth vs. Ames, *169 U. S., 400*, a statute of Nebraska fixed a rate upon intrastate freight, and among others, the Chicago & N. W. R. R. Co., a corporation organized under the laws of Illinois, Wisconsin and Iowa, and having no contract right to do business in Nebraska attacked such statute as violative of the Federal Constitution. If the principles laid down in the Prewitt case were applicable to a railroad, the court in the Ames case would necessarily have held that as the State of Nebraska had the right to arbitrarily exclude the Chicago & Northwestern Railroad Company from doing an intrastate business within its borders, it could allow it to do such business upon such terms as it chose to establish, and could, therefore, prescribe what rate it should charge in the conduct of such business, regardless of whether such rates were compensatory or not; but it was not contended in that case, nor has it ever been contended, so far as we have observed, in any of the familiar rate cases, that the State may arbitrarily exclude a foreign railroad company that has acquired railroad property within its domain upon its invitation from doing an intrastate business therewith within its territory, or that such State can arbitrarily declare the terms upon which the corporation shall do such business. On the con-

trary, it has been universally held that any law, prescribing less than compensatory rates to be charged upon intrastate business by such a corporation, is violative of the Fourteenth Amendment of the Constitution of the United States and void.

A distinction between a case in which the right to exclude a foreign corporation involves no destruction of property rights, as in the Prewitt case, and one which does involve the destruction of property rights, as in the case of a railroad corporation that has acquired a railroad in the State, is discussed in the National Council U. A. M. vs. State Council, 203 U. S. 161, it is said:

> "The most serious aspect of the defense is presented by the matter of the plaintiff's name. If the Legislature of the State undertook to appropriate to the use of its own creature a trade name of known commercial value, of course, the argument would be very strong that an act of incorporation could not interfere with existing property rights. And no doubt within proper limits the argument would be as good for a foreign corporation as for a foreign person. But that is not what has been done in this case.
>
> The name in question is not the name of the principal defendant, but distinguished from that name as State and National Councils no doubt generally are distinguished by members of similar institutions. It is the name of a voluntary association of which the officers are defendants. But it is not used even by that association in its own right, but only under a charter from, and in the right of, the Pennsylvania corporation. Furthermore, the name is not associated with a product of any kind. Its only value to the defendants, in a property sense, is as tending to invite membership in a club which professes to derive its existence and its powers from the Pennsylvania Company. It does not seem likely that any one would join the plaintiff, and certainly no member could be retained in ignorance of its alienation from the National Council. As the National Council has its branches elsewhere, and as the plaintiff is on its face a state organization, competition outside the State appears improbable. So that the claim of the defendants comes down to a claim of right to compete within the State, and

a right, as we have said, of or in behalf of the Pennsylvania corporation which controls the existence of its subordinate Virginia councils. Thus the question as to the grant of the name passes over into the question as to the exclusive right of the plaintiff to issue charters which was the other legislative grant.

The Supreme Court of Appeals was right, therefore, in treating the constitutional question as depending on the power of the State with regard to foreign corporations. That must decide the case. Now it is true, of course, that an unconstitutional law no more binds foreign corporations than it binds others. Carroll vs. Greenwich Ins. Co., 199 U. S., 401, 409. **And no doubt a law specially directed against a foreign corporation might be unconstitutional, for instance, as depriving it of its property without due process of law.** See Blake vs. McClung, 172 U. S., 239, 260. But when the so-called property consists merely in the value that there might be in extending its business or membership into a state, that property, it hardly need be said, depends upon the consent of the State to let the corporation come into the State."

In the case of the Seaboard Air Line Rwy. Co. vs. Railroad Commission, 155 Fed., 803, it is said:

"There is no hint in these statutes that the rights to be acquired might in any contingency be less in extent or value than those these laws offered, or that, instead of buying the right to use the property in local commerce for the time, and upon the conditions, prescribed by the existing laws, the purchaser took out only a temporary license to do a local business, revocable at the mere will of the State, at any time, or that the State might forfeit the right to do such business for any cause, which would not forfeit the right of any other property holder, similarly situated, to put his property to any lawful use. The reservation of any such right on the part of the State cannot be raised by implication, except by repudiating alike the plain language of the statutes, the declared objects they had in view, and the obligation of contracts entered into in pursuance of them. 'It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle

which goes in destruction of it.' Murray vs. Charleston, 96 U. S., 445, 24 L. Ed., 760.

The mere arbitrary right of the State to expel a foreign corporation not having been reserved, it was abandoned and waived. It was at the option of the State in the first instance to permit complainants to come only as its tenants at will, as to domestic business, or to permit them to contract for the enjoyment of property rights inconsistent with the exercise of this arbitrary prerogative of expulsion at pleasure. When the State consented to complainants' making contracts inconsistent with this prerogative, which contracts, if made, necessarily involved the acquisition of a vested right in the foreign corporation to use railroad property here, upon the terms and for the time and for the uses provided in the statute, the state consented to waive and abandon this right, and it is now estopped to withdraw its consent, to the prejudice of any one who acted upon that consent. Walker vs. United States (C. C.), 139 Fed., 413.

Besides, acts the State suggested and desired the foreign corporations to do, under its own proposal, contained in its own laws, have resulted in contracts vesting in the foreign corporation the title to property and the right to use it, for the very purpose which the State now seeks to prevent. The Constitution of Alabama, Sec. 95, forbids the State from now interfering with that use. Rights like these the Constitution of the United States also protects, in their integrity, against all hostile action of the State, except for forfeiture for cause, for misuser, or nonuser, prescribed by the law of the land, and applicable alike to all other corporations and natural persons similarly situated, and by judgment of the courts, after hearing, and not by statutory edict."

In the case of Chicago R. I. & C. Ry. Co. vs. Swanger, 157 Fed. 791, it is said:

"The Missouri statute does not provide that the litigation of nonresident railway corporations shall not be had in United States courts, but provides that if carried there, its rights of doing business shall cease for five years. An analysis of a few of the decisions of the Supreme Court will lead to the conclusion about which there can be no doubt. In Doyle vs. Insurance Co., 94

U. S., 535, 24 L. Ed., 148, there was under consideration a statute of Wisconsin which provided that, if any foreign insurance company removed any case to an United States court, its right to do business in the State should cease. A case having been removed, the company sought to enjoin the revocation of its license and from being ousted from the State. The Supreme Court held the statute to be valid and enforceable. The recent case of Insurance Co. vs. Prewitt, 202 U. S., 246, 26 Sup. Ct. 619, 50 L. Ed., 1013, construing a Kentucky statute, is to the same effect. There are many other decisions of like holdings by judges on the circuit, which will not be reviewed. But from these two decisions, and the one so recent, it can be stated that the undoubted rule is that a foreign corporation can be kept out, or excluded when once in, by any State, and this with or without good reason, and for no reason at all. Such is the general rule, but to which there are exceptions, presently to be noticed. In the two cases cited the company had no property in the State, and had made no investments, but had a license to do an insurance business. It is true the company had advertised its business, established agencies, and incurred expenses of those kinds. So that as to a foreign insurance company it is wholly immaterial for what reason the State does not desire it to continue in business. It can be excluded, and the company can have no relief.

The State officers insist that the two cases cited, and those of like holdings, demand at the hands of this court a decree upholding the validity of the Missouri statute in question. The concluding paragraph of the majority opinion of the Doyle case will arrest the attention of any one investigating the question in all its phases. It was said:

> 'No right of the complainant under the laws of the Constitution of the United States, by its exclusion from the State is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court.'

Whether a State can prevent a foreign corporation engaged in interstate commerce from coming in the State will not be here discussed. An insurance company is

not engaged in commerce, and therefore that questio
was not covered in the cases cited. In the cases at b
a license to do business is not the question. Each of t
companies invested millions of dollars, and it is now
the State and cannot remove. To prevent it from doi
business, means appropriating its property, or destroyi
it, without making any compensation therefor. It w
invited to come into the State, and was told by the la
then in force that it would have the same and like stan
ing as resident companies, with benefits as great, a
with burdens no greater. After these investments h
been made, and which cannot be withdrawn, it is declar
by legislation that no kind of litigation shall be carri
on by it in any court other than the state courts, l
leaving to the corporation organized under the laws
the State to go to the national courts with its litigati
of all kinds arising under the laws or Constitution of
United States. * * * * *
* * * * But for another reason the statute is v
as being in conflict with the national Constitution, in t
it is repugnant to the provision which reads:

'No State shall pass any law impairing the obli
tion of contracts.'

It is stoutly denied that there is any contract, and,
course, there must be a contract before the obligation
one can be impaired. What was the contract?
State gave it the power of eminent domain. In many
stances it gave it pecuniary aid. It gave it the right
a common carrier. It gave it the right to charge rea
able prices for its services. It promised it the equal
tection of the laws as to taxation, and equal protec
with others against all who might seek to injure its p
erty or earning power. The State in effect said: 'M
your investments and we will give you these rig
The company accepted the offer and made the inv
ments, and now cannot remove if it so desired, bec
it has a contract in perpetuity to serve the people
common carrier and to give efficient service for rea
able remuneration. That there is a contract is c
discerned. And that being so, the most recent cas
all, that of American Smelting Company vs. Colo
204 U. S., 103, is decisive of this phase of the case.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

LOUISVILLE & NASHVILLE RAILROAD CO.,
vs.
JOHN B. GASTON. **No. 451.**

SOUTHERN RAILWAY CO.
vs.
SAMUEL E. GREENE. **No. 450.**

CENTRAL OF GEORGIA RAILWAY CO.
vs.
JOHN B. GASTON. **No. 466.**

SEABOARD AIR LINE RAILWAY
vs.
JOHN B. GASTON. **No. 483.**

BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANTS IN ERROR.

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Attorney General of Alabama.

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BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANTS IN ERROR.

INTRODUCTORY STATEMENT.

The revenue law in the Code of 1896 contained the following provision in Subdivision 55 of Section 4122:

> "All corporations doing business in this State, whether organized in this state or another state or country, not ohtrewise specifically required to pay a license tax, shall pay annually the following privilege taxes: Corporations whose paid-up capital stock is under ten thousand dollars, ten dollars. Corporations whose paid-up capital stock exceeds ten thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars; when the paid-up capital stock exceeds fifty thousand dollars and is not over one hundred thousand dollars, forty dollars; where the paid-up capital stock exceeds one hundred thousand dollars and does not exceed two hundred thousand, seventy-five dollars; where the paid-up capital stock exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars, one hundred and twenty-five dollars; where the paid-up capital stock exceeds three hundred thousand dollars and does not exceed four hundred thousand dollars, one hundred and seventy dollars; where the paid-up capital stock exceeds four hundred thousand dollars and does not exceed five hundred thousand dollars, two hundred dollars; where the paid-up capital stock exceeds five hundred thousand dollars and does not exceed one million dollars, three hundred dollars; where the paid-up capital stock exceeds one million dollars, five hundred dollars."

This section of the Code was amended by Act approved March 5, 1901, but only with respect to the amount of the tax, the maximum amount remaining five hundred dollars where the paid-up capital stock exceeded one million dollars. Acts 1900-1901, p. 2616.

On November 28, 1901, the new Constitution of Alabama went into effect. Sections 229 and 232 of this Constitution, not contained in the previous Constitution, are as follows:

> "229. * * * The Legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the Legislature; and shall pass general laws under which charters may be altered or amended. *The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock;* but strictly benevolent, educational or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration or repeal under general laws."
>
> "232. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business by service of process upon an agent anywhere in the State. *The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.* Strictly benevolent, educational or religious corporations shall not be required to pay such a tax."

In obedience to the mandate of section 232 of the Constitution, above quoted, the Legislature at its session in 1903, the first session to convene after the ratification of

the Constitution of 1901, passed an Act amending the revenue laws, which Act contained the following provision (Acts 1903, p. 296):

> "A. Every foreign corporation, except railroad, telegraph, long distance telephone, express and sleeping car, life and fire insurance companies, building and loan associations, banks or banking associations, authorized to do business under the general law, shall pay to the Judge of Probate of the county in which it has a resident agent a license fee of one-tenth of one percentum for the use of the State, and of one-half that sum for the use of the county, *for the privilege of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State*, to be computed upon the basis of the amount of capital actually employed by it within this State."

The Act further provided for the return to be made by the corporation of the facts necessary to enable the amount of the tax to be determined, and provided that no foreign corporation required to pay the tax should do any business in the State, not constituting interstate commerce, unless such corporation had paid the tax imposed within sixty days after the same became due.

Some doubt having been raised as to the validity of the above statute on the ground that it had been passed during the last five days of the session, in violation of section 70 of the Constitution, the Legislature, at its next session in 1907, passed the following Act, which is the Act under which this controversy arises:

> "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax.

Section 1. Be it enacted by the Legislature of Alabama, That every foreign corporation authorized to do business in this State under the laws of the State of Alabama, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate of the county in which it has a resident agent a franchise tax for the use of the State of Alabama, as follows: A. Each foreign corporation whose actual amount of capital employed in this State is one hundred dollars or less shall pay an annual franchise tax of twenty-five per centum of the actual amount of capital employed in this State by it. B. Each foreign corporation whose actual amount of capital employed in this State exceeds one hundred dollars and does not exceed one thousand dollars shall pay an annual franchise tax of twenty-five per centum upon the first one hundred dollars of the actual amount of capital employed in this State by it, and five per centum upon all such remaining actual amount of capital employed in this State by it over one hundred dollars and up to and not exceeding the said limit of one thousand dollars. C. Each foreign corporation whose actual amount of capital employed in this State exceeds one thousand dollars shall pay an annual franchise tax of twenty-five per centum on the first one hundred dollars of such actual amount of capital employed in this State by it, and five per centum upon all such actual capital employed by it in this State in excess of one hundred dollars and up to and including one thousand dollars, and one-tenth of one per centum upon all such remaining actual capital employed in this State by it over and above one thousand dollars. E. The president or other executive head and the secretary of every foreign corporation subject to a tax under this Act shall make a written statement, under their oath, to the Judge of Probate, showing the name of the corporation, the State

or country under whose laws it was incorporated, its principal place of business in this State, the total amount of its capital stock, the actual amount of capital employed in this State, if it is a corporation, at the time of the statement, authorized to do business in this State, or the actual amount of capital it is proposed shall be employed in this State, if it is a corporation not then qualified to do business in this State. The Judge of Probate shall have power to summon before him any of the officers of the corporation, or any other witness, and to swear and examine them and to inspect any of the books, papers or documents of the corporation, and for that purpose to compel their production; and if he is satisfied from the evidence thus obtained that the amount of the capital of the corporation actually employed, or to be employed, as the case may be, in this State is placed in the statement at a less amount than it should be, it shall be his duty to demand payment of the tax upon the amount of capital which he finds is actually employed in this State. Either the State or the corporation may appeal from his finding to the Circuit Court in the same manner as may be done when the Court of County Commissioners passes upon a contested assessment of property for taxation, and the proceedings subsequent to the appeal shall be the same as in such cases. F. No foreign corporation which has paid the tax required under this Act shall be required to pay the taxes imposed by subdivision 24 of section 4122 of the Code of 1896, as amended by an Act of the General Assembly entitled an Act to further amend the revenue laws of the State of Alabama, approved March 5, 1901. G. No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama, not constituting interstate commerce, or maintain or demand any action in any of the courts of this State upon a contract made in this

State, other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due. H. No corporation required by the provisions of this Act to pay a franchise tax which corporation shall have paid the license taxes for this current year, as provided by the corporation laws now in force in this State, shall be required to pay a franchise tax under this Act before the first day of January, 1908. I. The payment of the franchise tax required by this Act in any one county shall be sufficient, notwithstanding the said corporation may do business or have a resident agent in more than one county. J. The payment of the franchise tax herein required shall not exempt any corporation paying the same from the payment of the regular license or privilege tax specified or required for engaging in or carrying on any business for the engaging in or carrying on of which a license is required of individuals, firms or corporations.

Section 2. That in addition to the amount of franchise tax required to be paid by each foreign corporation to the State, such foreign corporation shall pay to the county for the use of such county an amount equal to one-half of the amount paid by it to the State; and such amount so received shall be paid over by the Probate Judge to the county treasurer for the use of the county."

The Legislature of 1907 also adopted a new Code, known as the Code of 1907, prepared by codifiers theretofore appointed, which Code changed subdivision 55 of section 4122 of the Code of 1896, being the statute first above quoted, as amended by Act of March 5, 1901, by making it apply only to corporations organized under the laws of Alabama (Code of 1907, Sec. 2361, Subdivision 26).

In the administration of the statute complained of the probate judges decided that the "actual capital employed

in the State" by each foreign corporation was represented by the value of the property in the State owned by it and used in the transaction of its business, and took the assessed value of such property as the basis for measuring the amount of the tax.

Each of the plaintiffs in error in these cases paid, under protest, the taxes assessed against it and then instituted suit to recover the amount paid. The defendants, in each such case, asserted the constitutionality of the statute by demurrers of the complaint. The demurrers were sustained by the trial court, and plaintiffs having declined to amend or plead further, judgment was rendered in favor of the defendant.

The Supreme Court of Alabama on appeal (*Southern Railway Co. v. Greene*, 49 Southern Rep. 404) affirmed the judgment of the lower court, declaring that the tax is a *privilege* tax, and *not a property* tax that the statute does not impair the obligation of any contract; that it was not an unlawful burden upon or interference with interstate commerce; that it was not an unjust discrimination against foreign corporations; and, impliedly, at least, that the method adopted in determining the amount of the tax was correct.

ARGUMENT.

Counsel for plaintiff in error assail the tax upon three grounds:

First—Because the imposition of the tax, as to plaintiff in error, impairs the obligation of a contract between it and the State of Alabama in violation of section 10 of article I of the Constitution.

Second—Because the imposition of the tax upon foreign corporations alone is an unjust discrimination and a denial of the equal protection of the law, in violation of the Fourteenth Amendment, since a like tax is not imposed on domestic corporations.

Third—Because the tax is a burden upon, interference with, or regulation of interstate commerce, in violation of section 8 of article I of the Constitution.

These grounds will be discussed in the order above named.

I.

THE ALLEGATIONS OF THE COMPLAINT FAIL TO SHOW ANY CONTRACT BETWEEN THE STATE AND PLAINTIFFS IN ERROR THE OBLIGATION OF WHICH IS IMPAIRED BY THE IMPOSITION OF THE TAX.

The contract between plaintiffs in error and the State set up in the complaint and relied on, is a contract by which the State is supposed to have bound itself to forever permit plaintiffs in error, foreign corporations, to exercise their corporate powers in the State of Alabama with respect, at least, to those railroads operated by them which they purchased under authority of the laws of Alabama. This contract is not an express contract, but, it is claimed, is one arising by implication from the general authority conferred by sections 1169 and 1170, Code 1896, upon foreign railroad corporations which have acquired all the capital stock of a domestic railroad corporation, to purchase the road-bed, properties, rights and franchises of the domestic corporation, and the purchase of the railroad, etc., of domestic corporations in reliance upon such authority. Section 1169 of the Code of 1896 is as follows:

> "When all the capital stock of a railroad company chartered under the laws of this state is owned by a railroad company chartered by the laws of another state, it shall be lawful for the domestic corporation to sell and convey to the corporation owning its stock, all of its property, road-bed, rights and franchises;

but the purchasing corporation shall keep an office and an agent in this state; and such railroad so purchased shall be in all respects, subject to the laws of this state as if owned by a domestic corporation, and all liens and rights of creditors shall be preserved unimpaired."

Section 1170 of the Code is as follows:

"A corporation, chartered under the laws of this or any other state, heretofore or hereafter created for the purpose of building, constructing or operating a railroad, may, at any time, by means of subscription to the capital of any other corporation or company, or otherwise, aid such corporation or company in the construction of its railroad for the purpose of forming a connection with the road owned by such corporation or company furnishing aid; or any railroad corporation, organized in pursuance of the laws of this or any other state, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such road are continuous or connected, upon such terms and conditions as may be agreed upon between the corporations or companies respectively; or any two or more railroad corporations or companies, whose lines are so connected, may enter into any arrangement for their common benefit consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each such corporations or companies has been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of a majority in value of the stock of such corporation or company, represented at such meeting in person or by proxy and voting thereat, shall have assented thereto."

From these statutes and the purchases made in reliance thereon, it is contended, arose a contract between plaintiffs in error and the State of Alabama, which contract prevents the State of Alabama from imposing upon them, as foreign corporations, the tax in controversy, on the theory that the obligation of the contract is impaired by the imposition of the tax. It becomes necessary, therefore, to determine whether the facts alleged constitute a contract, and if so, what is the contract and what the obligation of the State created thereby which is impaired by the imposition of the tax. The theory of plaintiffs in error is, that a foreign corporation having, with the express consent of the State, purchased the railroad and franchises of domestic railroad corporations, the State impliedly agreed that the purchasing corporation should have the power to operate the railroad purchased and exercise the franchises of the domestic selling corporation without being burdened with any tax which could not have been imposed on the domestic corporation if it had not disposed of the road.

The theory and argument of counsel for plaintiffs in error are, we think, based on an entire misconception as to the nature of the tax in controversy. It is not a tax imposed on plaintiffs in error for the privilege of operating railroads in Alabama, or for the privilege of operating in Alabama, those railroads which they had purchased with the consent of the State. As such it would be a mere occupation tax. In its scope and purpose the statute imposing the tax is much broader than this. Section 232 of the Constitution, after first prescribing the conditions upon which foreign corporations can engage in business in this State, makes it the duty of the Legislature to impose upon such foreign corporations as have acquired that right a *franchise* tax, that is to say, a tax for the privilege of exercising in this State corporate powers granted and controlled by another State. The tax is, therefore, not a tax for the privilege of doing the particular business in which the foreign corporation happens to be engaged in the State.

but a tax for the privilege of exercising in the State corporate powers granted and controlled by another State, regardless of the business carried on, powers which it could not exercise in the State without the consent of the State. If a foreign corporation authorized by its charter to do a banking business, an insurance business, a manufacturing business and a railroad business should enter Alabama by complying with the requirements of section 232 of the Constitution and statutes enacted in pursuance thereof, it would have the right to carry on all or any of these businesses in the State. The tax would be the same whether it carried on all or only one of these businesses, except as it might be increased or diminished by the actual amount of capital employed. As the tax is not imposed upon plaintiffs in error for the privilege of operating railroads, it is entirely immaterial that the railroads operated by them were once owned by domestic corporations and were sold by consent of the State.

The allegaitons of the complaint do not show an irrevocable contract between plaintiffs in error and the State for the following reasons:

FIRST. Counsel for plaintiffs in error contend that when the Legislature of Alabama authorized a foreign railroad corporation to acquire the railroad and franchises of a domestic corporation it thereby authorized the foreign corporation, and agreed that it should have the power, to operate the railroad purchased. This proposition, we contend, is erroneous. The Legislature was and is utterly without power to confer upon a foreign corporation the right to operate a railroad in the State by conferring upon it the authority to purchase the property and franchises of a domestic corporation. To operate a railroad in the State is to do business in the State, and a foreign corporation acquires the right to do business in the State only in one way, that is, by complying with the requirements of the Constitution of the State and the statutes made in pursuance thereof. A foreign railroad corporation having

been authorized to do business in the State has the right to operate any railroad which it acquires. The Legislature may authorize it to acquire the railroad and franchises of a domestic corporation, but it cannot authorize it to operate the railroad merely by consenting to the acquisition of it. If the foreign corporation purchasing the railroad of a domestic corporation never qualified to do business in the State in the manner prescribed by the Constitution, it would have no power to operate the railroad purchased, at least in intrastate business. Hence the right of plaintiffs in error to operate the railroads purchased with the consent of the State did not arise from, and was not, and could not be, the subject of a contract based on, their purchase of domestic railroads under authority of the statutes relied on. This follows necessarily and indisputably, we think, from the provisions of section 4 of article XIV of the Constitution of 1875 and section 232 of the Constitution of 1901, one or the other of which constitutions was in force at the time of the purchases of the various railroads and at the time of the enactment of the statutes relied on. Section 4 of article XIV of the Constitution of 1875 was as follows:

> "No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein."

Section 232 of the Constitution of 1901 is as follows:

> "No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein and without filing with the Secretary of State a certified copy of its articles of incorporation or association."

These provisions of the Constitution have always been held to be self-executing. No foreign corporation, there-

fore, after the ratification of these Constitutions, could be authorized by the Legislature to do business in Alabama except upon compliance with the conditions there imposed. The Legislature might have added to these conditions, but it had no power to waive any of them. Consequently no contract between plaintiffs in error and the State by which the former were allowed to do business in the State can be implied from the mere purchase, under authority of the statutes relied on, of the franchise of a domestic corporation to operate a railroad. Such authority was necessarily derived solely from compliance with the constitutional provision and the statutes enacted to carry the same into effect. A right so acquired by a foreign corporation has always been held to be a mere permit or license, having none of the elements of a contract, and subject at all times to revocation or alteration by the Legislature.

Connecticut Mutual L. Ins. Co. v. Spratley, 172 U S. 602;
Security Mut. L. Co. v. Prewitt, 202 U. S. 246.

We insist that there was no thought or intention on the part of the legislature to create a contract of any kind, or to confer a power or right by contract by the enactment of the statutes authorizing the sale of domestic railroads to foreign corporations. In order to properly construe these statutes due consideration must be given to the state of the law previous to the enactment of the statutes and the purpose sought to be accomplished by the statutes. With respect to corporations, it is almost universally held that a public service corporation has no power to sell, mortgage or lease any of its property or franchises necessary to enable it to perform its public functions without the express consent of the legislature. It cannot abandon its public functions by a sale of its property or franchise even to another corporation.

Central Transportation Co. v. Pullman Pal. Car Co., 139 U. S. 24;
American Lumber Co. v. T. V. R. Co. (Ala.) 45 So. Rep. 911.

It seems clear, therefore, that the sole purpose of the legislature, in enacting this statute was, not to confer any contract right or power upon the purchasing corporation, *but simply to give the consent of the State* to the sale by domestic corporations of their properties and franchises to other corporations—to authorize the domestic corporation to abandon its public functions with respect to the road sold. From a statute enacted with this purpose in view, no contract such as is claimed can be implied.

SECOND. The Legislature was without power to bind the State by an irrevocable contract of the kind set up in the complaints, and, therefore, no privilege, power or immunity can be inferred from the mere purchase of the railroads under authority of the statute, which cannot be revoked or altered, or be burdened with a tax, by a subsequent Legislature.

Section 23 of article I of the Constitution of 1875 provides that:

> "No ex post facto law, or any law impairing the obligation of contracts, *or making any irrevocable grants of special privileges or immunities*, shall be passed by the general assembly."

Section 22 of the Constitution of 1901 contains the same provision, with the following provision added:

> "And every grant or franchise, privilege or immunity *shall forever remain subject to revocation, alteration or amendment.*"

The two provisions, we think, mean the same thing. Under the first, all grants of the kind specified may be

revoked. If the Legislature has power to revoke them, it has power to modify, alter or amend them, as provided by the second.

> Wilmington C. R. Co. vs. Wilmington, etc. R. Co., (Del. Ch.) 46 Atl. Rep. 18;
> 8 Cyc. 964.

Some of the purchases of domestic railroads were made under the Constitution of 1875, and some under that of 1901. In either case, the above reservation of power made it impossible for the Legislature to make an irrevocable contract with a foreign corporation, that it should be allowed to exercise its corporate powers in the State, or to operate a railroad in the State, and that no burdens or conditions should in the future be imposed on it. The State must be considered to have reserved the power to revoke the contract, if any was created, to the extent, at least, of imposing new burdens or conditions. Having the power to revoke, it could modify the terms of the powers or privileges conferred. The appellants, of course, acquired the title to the physical property they purchased, but they took the property subject to the power of the Legislature to impose burdens and conditions with respect to the right to operate the roads, or, in other words, to do business in the State.

> Stanislaus County v. San Joaquin, etc. Co., 192 U. S. 201, and cases cited.

THIRD. The facts alleged in the complaints, namely, the purchase of the properties and franchises of domestic corporations under authority of the statutes, do not constitute contracts between appellants and the State of Alabama, because of the entire lack of that essential element of all contracts, a consideration. It will be observed that the rights claimed by appellants are claimed under a gen-

eral statute, not addressed to any particular corporation. There is a clear distinction between a general statute authorizing corporations to do certain things, or conferring certain powers or immunities, not addressed to any particular corporation, and a special statute, addressed to a particular corporation, conferring such rights. In the latter case a consideration is implied. The mere fact that such a statute is special and addressed to a particular corporation, shows that the detriment suffered or change of position by the corporation, in acting in reliance upon the statute, was the inducement to the promise contained in, or rights conferred by, the statute, thus giving rise to the consideration. But, in the case of a general statute, there is no consideration whatever. The general statute simply indicates the general policy of the State, without containing any of the elements of a contract, and may, therefore, be amended at any time, notwithstanding a corporation, relying on the statute, has expended money or otherwise suffered detriment. The detriment suffered in reliance upon the statute is not considered as the inducement to any promise on the part of the State, and, therefore, is not a consideration for any supposed promise.

W. & M. R. Co. v. Powers, 191 U. S. 379;
Stanislaus County v. San Joaqin, etc. Co., 192 U. S. 201.

Even if a detriment, which is not the inducement for a promise, could constitute a consideration, yet in the case at bar there was no detriment suffered *on account of the purchase of the domestic railroads* by those companies which purchased under the authority of section 1169 of the Code of 1896, after having first acquired all the capital stock of the domestic companies. The only corporations which could purchase the domestic railroads under said section were those which had previously acquired all the capital stock of the domestic corporation. *The pur-*

chase of property, therefore, involved no expenditure of money, since in the purchase, the corporation was simply dealing with itself. The expenditure of money was made in the acquisition of the capital stock, which was not authorized by this section, and the purchase may be made, under the statute, although the stock was acquired before the statute was enacted. The purchasing corporation was the beneficial owner of the property purchased before the purchase was made, since it owned all the capital stock. It merely acquired the naked legal title by the purchase and suffered no detriment in so acquiring it.

What has been said above is for the purpose of showing that the facts alleged do not show a contract between the State and plaintiffs in error.

But assuming that a contract was created by the purchase of the properties and franchises of the domestic corporations, what is the obligation of the State under the contract, and how will that obligation be impaired by the imposition of the tax complained of?

We insist that the most that such contract conferred upon the purchasing railroads, if anything, was the right to operate the roads purchased and to take toll, and the obligation of the State, if any, was not to arbitrarily prohibit the foreign corporation from operating the roads purchased. The contract or statute certainly does not contain any express stipulation or provision confering immunity from taxation on account of the operation of the roads purchased, or exempting the purchasing corporations from any tax not imposed on domestic corporations. Such immunity or exemption can arise only from a contract or statute containing express words which admit of no doubt as to the intention of the State to confer such immunity or exemption.

People ex rel. Met. St. Ry. Co. v. State Board, 199 U. S. 1.

Consequently there was no obligation on the part of the State, arising from the alleged contract, not to impose such tax. It is true that the act imposing the tax provides that "no foreign corporation required to pay a tax under this act shall do any business in the State of Alabama, not constituting interstate commerce, * * * unless such corporation shall have paid such tax within sixty days after the same became due." If this were an attempt on the part of the State to exclude appellants from the State, or to restrain them from doing business within the State, and if such contract existed, the enforcement of the above provision would, perhaps, be an impairment of the obligation of the contract. But the provision is a mere penalty imposed for the nonpayment of the tax, and certainly a tax may be valid, and the payment of it enforced, although the penalty for the non-payment of it may be void. A statute may be valid in part and void in part, and the void part may be stricken down and the valid part allowed to stand, unless the two parts are so dependent on each other *that it is evident the legislature would not have enacted the one without the other.—Little Rock, etc. R. vs. Worthen*, 120 U. S. 97. It is not conceivable that the legislature would have refrained from enacting this statute simply because it could not impose the penalty. The primary object of the act was to raise revenue for the State, not to impose conditions upon which foreign corporations could do business in the State. This is shown by the title of the act, which is, "An act to provide for the revenue of the State," etc. Clearly, this manifest purpose of the act cannot be defeated because the penalty is void. Even if it should be held that the provision above quoted was intended to be, and is, the statutory remedy for the enforcement of the tax, yet the decisions of the Supreme Court of Alabama, contrary to the decisions in some other States, hold that the remedy given by statute for the collection of a tax *is not exclusive*, and that an action of assumpsit can always be maintained, notwithstanding the statutory remedy.—*City of Anniston vs. Southern Railway Co.*, 112 Ala. 557.

II.

THE IMPOSITION OF THE TAX COMPLAINED OF IS NOT AN UNJUST DISCRIMINATION AGAINST FOREIGN CORPORATIONS AND THEREFORE IS NOT A DENIAL OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The second ground upon which plaintiffs in error base their contention that the tax is unconstitutional is, that they are persons within the jurisdiction of the State within the meaning of the Fourteenth Amendment, having a right by contract with the State to do business in the State, and therefore entitled to the equal protection of the laws and being entitled to the equal protection of the laws, the State cannot impose upon them any tax different in character or amount form that imposed upon domestic corporations engaged in like business.

It is undoubtedly true that appellants are persons within the jurisdiction of the State, within the meaning of the Fourteenth Amendment, and as such are entitled to the equal protection of the law. But they are not persons within the jurisdiction of the State because of any contract with the State, but simply because they are doing business in the State with the consent of the State and under authority of its laws. Every corporation doing business in a State other than that of its creation, with the consent and permission of that State, is a person within the jurisdiction of such State, whether that consent arises from contract or from mere license.

Santa Clara Co. vs. So. Pac. R., 118 U. S. 394;
Charlotte, etc. R. vs. Gibbs, 142 U. S. 386;
Minneapolis R. vs. Beckwith, 129 U S. 26;
Gulf, Col. etc. R. vs. Ellis, 165 U. S. 150.

The fact that the State is bound by contract to permit a foreign corporation to continue to do business in the State does not give it any greater or higher or different right to the equal protection of the law, as a person within the jurisdiction of the State, than it would be entitled to if its authority to carry on business in the State were based on a mere permit or license. The contract gives it no additional rights under the Fourteenth Amendment, but only brings it within the protection of section 10 of article I of the Constitution, prohibiting any State from enacting a law impairing the obligation of a contract. If, therefore, appellants are entitled to immunity from this tax on the ground that they are persons within the jurisdiction of the State, then all foreign corporations authorized to do business in the State are entitled to immunity from a franchise or privilege tax not imposed on domestic corporations. Yet it has always been held by the Supreme Court of the United States, and of many of the States, that it is not a denial of the equal protection of the law to impose on a foreign corporation a tax for the privilege of doing business in the taxing State, when no such tax, or a tax of a different amount, is imposed on domestic corporations engaged in the same business.

19 Cyc. 1227 et seq.
Gray on Lim. of Tax Power, Sec. 1318;
Ducat vs. Chicago, 77 U. S. 410;
New York vs. Roberts, 171 U. S. 662;
Horn Silver Min. Co. v. New York, 143 U. S. 305;
Fire Asso. of Phil. vs. New York, 119 U. S. 110;
Commonwealth vs. Milton, 54 Am. Dec. 522;
Southern B. & L. Asso. vs. Norman, 31 L. R. A. 41;
Hughes vs. City of Cairo, 92 Ill. 339;
Scottish Un. Ins. Co. vs. Herriott, 77 Am. St. 548.

In addition to the above cases, there are two lines of cases which controvert the contention of counsel for plain-

tiffs in error, that any tax imposed upon a foreign corporation, which is not imposed on a domestic corporation engaged in the same busniess, is an unjust discrimination against the foreign corporations, and, therefore, a denial of the equal protection of the law guaranteed by the Fourteenth Amendment.

First—It is well settled by the Supreme Court of the United States, as well as by the highest courts of many States, that laws which impose upon foreign corporations the same taxation and other restrictions as are imposed upon corporations of the taxing State by the States where such foreign corporations were created, do not infringe any provision of the Federal Constitution.

Fire Asso. of Phil. vs. New York, 119 U. S. 110;
Home Ins. Co. vs. Swigert, 104 Ill. 653;
Gray on Lim. of Tax. Power, sec. 1314.

Now the effect of such laws is to do precisely what is claimed by counsel to be in violation of the Constitution of the United States, and the effect of said decisions is to justify and authorize the very thing that is here complained of. For example, if such a law were in force in Alabama, a New Jersey corporation doing business in this State, would be subject to the same franchise or other tax as the laws of New Jersey impose upon foreign corporations doing business in that State; and a Georgia corporation doing business in Alabama would be subject to the same franchise or other tax as the laws of Georgia impose upon foreign corporations doing business in that State, and so on; although no such tax, or tax of a different amount, was imposed by the laws of Alabama upon domestic corporations engaged in the same business. The result would be that the New Jersey corporation doing business in this State could legally have imposed upon it a tax different in character and amount from that imposed upon the Georgia corporation, and necessarily different in char-

acter or amount from that imposed upon domestic corporation, since the tax upon all domestic corporations would be the same, while that upon foreign corporations would vary according to the number of States. This is precisely what is claimed by counsel to be in violation of the Fourteenth Amendment, yet it is clearly sanctioned by the Supreme Court of the United States in the case above cited. —*Fire Asso. vs. New York.* That this is the effect of the decision in that case is clearly shown by the fact that Mr. Justice Harlan pointed out, and made the basis of his dissenting opinion, this very effect of the decision of the majority; but his was the only dissent, the other members of the court refusing to agree with him that this effect rendered the law unconstitutional.

The other line of cases which controvert the contention of counsel for plaintiffs in error arose in the construction and application of the franchise tax law of New York That law is similar, in effect, to the Alabama statute here assailed. As originally enacted, and as subsequently amended, it has many times been assailed in this Court both by foreign and by domestic corporations, but has never yet been held to infringe any provision of the Constitution. Originally the tax, as imposed upon foreign and domestic corporations, was based upon the entire capital stock of the corporation. Afterwards, in 1885, the statute was amended so as to provide that "the amount of capital stock which shall be the basis for tax under the provisions of section three * * * shall be the amount of capital stock *employed within this State.*" In this form the statute was upheld in *People ex rel. Parke Davis & Co. v. Roberts*, 171 U. S. 659, against the attack of a foreign corporation. In that case it was said:

> "It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a

> foreign corporation to do business within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax or a sum proportioned to the amount of its capital used within the state."

The New York statute designates the tax as a tax upon the "franchise or business" of the corporation. In construing the statute the Court of Appeals of New York, in *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, said: "The tax, when imposed on a domestic corporation, is a tax on its *corporate franchise;* when imposed on a foreign corporation is a tax *on its business*, a distinction based on the fact that corporate franchises are taxable only within the jurisdiction which creates them, and where alone they can be said to have a *situs.—People v. Equitable Trust Co.*, 96 N. Y. 388." In *Home Ins. Co. v. New York*, 134 U. S. 599, in which the tax was assailed by a domestic corporation, this court declared the tax to be a tax upon "the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise." In this statement the court manifestly referred to the tax when imposed on a domestic corporation, since it speaks of the "right or privilege *given by the State*" to two or more persons of being a corporation.

Now, it will be observed that, under the construction given to this New York statute by the above cases, the statute imposes a tax upon two distinct species of property, or upon two distinct privileges, or subjects of taxation; first, the right of a domestic corporation *to be a corporation*, which is a proper subject of taxation; and second, *the right of a foreign corporation to do business in the State*, that is, to exercise its corporate powers and functions in the State.

The franchise of a corporation *to be* a corporation is, if considered as property, an entirely different character of property, and if considered as a privilege, an entirely different character of privilege, from the franchise of a foreign corporation to exercise its corporate powers outside of the State of its creation, or the franchise of a domestic corporation *to do*, that is, to exercise certain powers. Each is a separate subject of taxation.—*Gray on Limitation of Taxing Power*, secs. 47, 51 and 1373. It will further be observed that the latter tax, that upon the foreign corporation, is not imposed upon the domestic corporation. We have then, in this statute, precisely the situation and conditions, with respect to franchise taxes upon corporations, that are complained of in the Alabama laws, namely, a tax upon foreign corporations for the privilege of doing business in the State, which is not imposed upon domestic corporations engaged in the same business. The only difference between the laws of the two States in this respect is, that in Alabama two statutes were enacted to impose the taxes that, in New York, are imposed by one statute. In Alabama, the act complained of, enacted in obedience to the mandate of section 232 of the Constitution, imposes the franchise tax upon foreign corporations for the privilege of doing business in the State, while another statute, enacted in obedience to the mandate of section 229 of the Constitution (Sec. 2361, subd. 26, Code 1907) imposes a tax upon domestic corporations, which is a tax upon the *right to be a corporation*. The same reasoning which persuaded the Supreme Court of the United States and the Court of Appeals of New York that the New York statute, as applied to foreign corporations, was not in violation of any provision of the Constitution of the United States, applies to the Alabama statute complained of, and supports its constitutionality.

But it may be claimed that the tax imposed by the New York statute upon domestic and foreign corporations is the same in amount, or is measured by the same standard,

while in the case of the Alabama statutes, the taxes against the two classes of corporations are measured by different standards; and that from this fact arises the discrimination in the latter case, and the lack of discrimination in the former. But the question of the constitutionality of the tax cannot be affected by this fact. The Constitution of the United States has nothing to do with the respective rates of taxation, or amount of tax, imposed upon several species of property, and does not prohibit the imposition of a greater rate upon one species of property than upon another. If the power be conceded to the State, under the Federal Constitution, to make a certain species of property subject to taxation, it is not a violation of that Constitution that the rate or amount differs from that imposed on another species.

In the case of *Coulter vs. Louisville & Nashville R. R. Co.*, 196 U. S. 599, it was said:

> "If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that the State had the power to tax it at a different rate, so far as the Constitution of the United States is concerned."

And, in *Pacific Express Co. vs. Seibert*, 142 U. S. 339, it was said:

> "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing the burdens or for being exempt from them, is not inconsistent with perfect uniformity and equality of taxation, in the proper sense of those terms."

The federal constitution imposes no restraint on the State in regard to unequal taxation.

Davidson vs. New Orleans, 96 U. S. 97.

As stated in *Merchants Bank vs. Pennsylvania*, 167 U. S. 461:

> "The whole argument of a right under the federal constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law, is put at rest by the decision in *Bell's Gap Railroad vs. Pennsylvania*, 134 U. S. 232."

There is no denial of the equal protection of the law when steam railroads in a city are exempt from a tax laid on street railroads.

Savannah, etc. R. vs. Savannah, 198 U. S. 392.

Or when underground city railroads are exempted from a tax which is laid on surface railroads.

Met. St. Ry. vs. New York, 199 U. S. 1.

Or where railroad property is assessed at a higher valuation than other property.

St. Louis, etc. R. Co. case, 132 Fed. Rep. 629.

So it has been held by the Supreme Court of the United States, that a law providing for the taxation of one class of railroads, on an ad valorem basis, and another class engaged in the same business, but exempted by their charter from ad valorem taxes, on the basis of their income, is not a denial of the equal protection of the law.

Columbus S. R. vs. Wright, 151 U. S. 470.

But the New York statute was again amended, and, as it appears in New York Laws of 1896, Chap. 908, § 182, as

quoted in *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 593, is now as follows:

> "Every corporation * * * incorporated * * * under * * * law in this State shall pay the State treasurer annually an annual tax, to be computed upon the basis of the amount of its capital stock employed within this State and upon each dollar of such amount" at a certain rate if the dividends amount to 6 per cent or more upon the par value of such stock. "If such dividend or dividends amount to less than 6 per centum upon the par value of the capital stock the tax shall be at the rate of 1½ mills *upon such portion of the capital stock at par as the amount of the capital employed within this State bears to the entire capital of the corporation.*" It is provided further by the same section that every foreign corporation "shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State, *to be computed upon the basis of the capital employed by it within this State.*"

This statute, so far as concerns those features which affect its constitutionality on the ground of discrimination, is precisely the same as the Alabama statute complained of. The tax, when imposed upon a foreign corporation is different in amount, or measured by a different standard, from that imposed upon domestic corporations engaged in the same business. The tax upon domestic corporations is based upon the capital stock, that is, upon such a proportion of the capital stock as the amount of capital employed in the State bears to the entire capital; while the tax upon foreign corporations is "to be computed upon the basis of the capital employed in the State." So, under the Alabama statutes, the tax imposed upon domestic corporations is graded according to the capital stock, while the

tax upon foreign corporations is a percentage of the capital actually employed in the State. The New York statute has never been declared discriminatory although it has many times been assailed before this court and the highest court of New York.

THE PRIVILEGE GRANTED BY THE STATE TO A FOREIGN CORPORATION TO ENTER AND CARRY ON BUSINESS IN THE STATE IS A SUBJECT OF TAXATION SEPARATE AND DISTINCT FROM THE PRIVILEGE GRANTED TO A DOMESTIC CORPORATION TO BE A CORPORATION.

There is a still stronger reason for the contention that there is not only no unjust discrimination, but no discrimination whatever, against plaintiffs in error in the imposition of this tax. There can be nothing discriminatory in a statute which imposes a privilege tax upon a foreign corporation based upon the actual amount of capital employed in the State and a tax upon a domestic corporation based upon the capital stock, even though the corporation be engaged in the same business, unless the subject of the tax, the privilege or right on account of which the tax is imposed, be the same. We earnestly contend that the Alabama tax is imposed on foreign corporations for and on account of the privilege granted to such corporations to exercise in the State corporate powers and functions granted and controlled by another State, or the privilege of exercising their corporate franchises or for carrying on their corporate business in such corporate or organized capacity in this State; and that the tax upon domestic corporations is imposed for the privilege or right to be a corporation. In the act of 1903, heretofore quoted, the tax on foreign corporations is expressly designated as a tax "for the privilege of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State." In the Act of 1907,

which is the Act complained of, and which was enacted solely because it was feared the Act of 1903 was unconstitutional because passed in the last five days of the session, these words were omitted, but it cannot be doubted that the subject of the tax is the same. In Home Insurance Co. v. New York, 134 U. S. 599, this Court declared the New York tax upon a domestic corporation to be a tax upon "the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, *and not the privilege or franchise which, when incorporated, the company may exercise.*"

Are not these privileges or rights thus taxed separate and distinct subjects of taxation? If so, there can be no question of discrimination. The State has selected one species of property or subject of taxation, namely, the right of two or more persons to be a corporation, and imposed a tax upon it graded according to the amount of its capital stock. It has selected another species of property or subject of taxation, namely, the privilege granted to a foreign corporation to enter and exercise in the State corporate powers and functions granted and controlled by another State, and imposed upon it a tax based on the capital actually employed in the State. If these privileges be separate and distinct subjects of taxation, the power of the State to select either or both for taxation cannot be denied. Undoubtedly the State has the power to tax the right or privilege of a corporation, or of two or more persons, *to be* a corporation. It has no power to tax the right of a foreign corporation to be a corporation, since the *situs* of this right for the purpose of taxation is in the State of its creation. The State, then, can tax a domestic corporation for the privilege of being a corporation without imposing any tax on a foreign corporation for the privilege of exercising its corporate powers in the State. Such a tax upon the domestic corporations alone would not be discriminatory. Does it not logically result that if a State may tax domestic corporations for the privilege of

being corporations without taxing foreign corporations for the privilege of doing business in the State, it may tax foreign corporations for the privilege of doing business in the State without taxing domestic corporations for the privilege of being corporations; and therefore does it not also logically result that it may impose upon the foreign corporation, for the privilege of doing business in the State, a tax different in amount, or measured by a different standard, from that imposed on a domestic corporation for the privilege of being a corporation? From the very nature of the one subject matter selected for taxation, namely, the right given a foreign corporation to exercise in the State corporate powers granted and controlled by another State, it is possessed only by foreign corporations. And inasmuch as all foreign corporations are taxed alike upon this subject of taxation there cannot be any discrimination in the tax.

It is not at all material that domestic corporations which are exempt from the tax complained of are engaged in the same business as the complaining foreign corporations. The fallacy of the whole argument of counsel for plaintiffs in error, we think, lies in their treatment of the tax, when applied to foreign railroad corporations, as a tax for the privilege of operating a railroad and doing a railroad business in the State. We have heretofore attempted to show that as such it would be a mere occupation tax, and that the statute has a broader purpose and scope than the imposition of an occupation tax. If a foreign corporation, having the power under its charter to engage in a dozen different kinds of businesses, should be admitted into the State, it would have the power to engage in all these businesses in the State, but the tax imposed by the statute complained of would be precisely the same as it would be if only one business was engaged in, provided the amount of capital employed in the State was the same.

THE VALIDITY OF THE TAX IS NOT AFFECTED BY THE FACT THAT PLAINTIFFS IN ERROR HAVE A RIGHT BY CONTRACT WITH THE STATE TO DO BUSINESS IN THE STATE, ASSUMING THAT SUCH CONTRACT EXISTS.

Plaintiffs in error do not, indeed, deny the general proposition that the State may impose upon foreign corporations a franchise or privilege tax for the privilege of doing business in the State, although no such tax is imposed upon domestic corporations. But they say this proposition applies only to those foreign corporations which the State has the power to exclude from the State; the State cannot exclude us because it has entered into a contract with us by which it has bound itself to permit us to continue to do business in the State ,the obligation of which would be impaired by excluding us, and, therefore, it cannot impose such tax upon us.

If their premises were correct, the above conclusion would logically follow. The power of the State to impose this tax upon foreign corporations only does not depend on its power to exclude such corporations. The question is one of discrimination—unjust discrimination—such as amounts to a denial of the equal protection of the law. The guaranty of the equal protection of the law contained in the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or from classifying subjects of taxation and corporations subject to taxation.—*Bell's Gap Railroad vs. Pennsylvania*, 134 U. S. 232; *Home Insurance Co. vs. New York*, 134 U. S. 594. While such classification must be reasonable, yet if any reason exists for the classification, it is a reasonable classification. The classification of corporations by the Alabama law, for the purpose of imposing franchise taxes, into foreign corporations and domestic corporations, is clearly reasonable. To fail to so classify them would result in imposing more

taxes upon domestic corporations than upon foreign. As shown above, the franchise tax imposed on domestic corporations is a tax for the privilege *of being a corporation* —a tax upon *corporate existence*. It was so declared in *Home Ins. Co. vs. New York*, 134, 594. The tax imposed upon foreign corporations is a tax upon *the right or privilege of a foreign corporation to do business in Alabama*,— the right to exercise in Alabama corporate powers granted by another State.—*People vs. Wemple*, 138 N. Y. 1. Now, the State has no power to tax the right of a foreign corporation *to be* a corporation, but can tax only its right to do business in the State. Hence, if the State taxed *only* the right of corporations *to be* corporations, the tax would reach domestic corporations only, and foreign corporations would escape. Or, if both a tax upon the right *to be* a corporation, and also a tax upon the right *to do business in the State*, were imposed upon domestic corporations, the result would be that the domestic corporations would have more taxes to pay than foreign corporations. Certainly, it is not a denial of the equal protection of the law to avoid this result, and any classification which will have the effect of avoiding this result is a reasonable classification. It is but an adjustment of the taxing system to avoid unjust burdens. It may be said that the State can avoid such classification by failing to impose upon domestic corporations the tax upon the right *to be* a corporation, and imposing the same tax upon both domestic and foreign corporations. But the right of a domestic corporation to be a corporation is a proper subject of taxation, and if the State deems it good policy to impose such a tax, it need not surrender its power to impose it, solely for the purpose of avoiding the necessity or justice of making such a classification.

In the case of *Columbus Southern R. vs. Wright*, 151 U. S. 470, the Supreme Court held that it was not a denial of the equal protection of the law to tax one class of railroads on an *ad valorem* basis, while another class which,

by their charters, were exempt from an *ad valorem* tax, were taxed on the basis of gross receipts. The legislature of Georgia has said to one class, "We cannot tax your property on an *ad valorem* basis, because your charter exempts you from such tax; therefore, we will tax you upon the basis of your gross receipts." So, the Alabama legislature has said, "We cannot tax you for the right *to be a* corporation, since the situs of that subject of taxation is in the State of your creation; therefore, we will tax you for the privilege of exercising in Alabama the corporate powers given you by the State of your creation." The sole ground for the classification in the above case was, that the one class was exempt from an *ad valorem* tax. So, in this case, the one class, foreign corporations, is exempt from the tax upon the right *to be* a corporation.

After a most diligent search, we have been unable to find any case which supports the contention of counsel for appellants, that where a foreign corporation is doing business in a State under a contract which prevents the State from excluding it, the State cannot impose upon it a franchise or privilege tax not imposed upon its domestic corporations; nor have we been able to find any case in which the question was raised. There is a case, however, the fair and legitimate inference to be drawn from which is, that such is not the law, and that is the case of *American Smelting Co. vs. Lindsay*, 204 U. S. 103. We invoke the Court's special attention to this case. The facts in the case were as follows:

By a general statute of Colorado, the conditions upon which foreign corporations should be allowed to do business in the State were prescribed, among which were the conditions that the foreign corporation should make application to the Secretary of State, and pay, for the use of the State, a sum which was a percentage of its capital stock. It was also provided that when admitted into the State the corporation should be subject to "the same liabilities" as domestic corporations. Under this statute, the Ameri-

can Smelting Co., a New Jersey corporation, made application for admission into the State, and paid the sum of $15,000.00. After its admission into the State a statute was enacted imposing upon domestic corporations a license tax of two cents upon each $1,000.00 of capital stock, and upon foreign corporations a tax of four cents upon each $1,000.00 of capital stock; and it was provided that any foreign corporation failing to pay the tax should forfeit its right to do business in the State. The American Smelting Company refused to pay the tax and *quo warranto* proceedings were instituted against it to exclude it from the State. The Supreme Court held that the tax of four cents impaired the obligation of the contract existing between the corporation and the State. But the contract was held to be impaired *only because it contained a stipulation that the foreign corporation "shall be subject to all the liabilities and duties which are or may be imposed upon such corporation of like character organized under the general laws of this State,"* which stipulation the Court construed to mean, that no other or greater taxes should be imposed on foreign than on domestic corporations.

Now, the plain inference from this case is, that in the absence of the stipulation above quoted, the tax would not have been void, because of unjust discrimination. It would have been much easier for the court to base its decision on the ground of unjust discrimination, if the imposition of a greater tax upon a foreign than upon a domestic corporation were a discrimination, than to have given to the stipulation above quoted a construction from which four of the Justices dissented. But the opinion itself shows that such taxation is not unjustly discriminative. It says:

> "A provision in a statute of this nature, subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character, must mean that it shall

not be subjected to any greater liabilities than are imposed upon such domestic corporations. *The power to impose different liabilities was with the State at the outset. They could make them greater or less than in case of a domestic corporation, or it could make them the same.*"

That is to say, although the American Smelting Company was a person within the jurisdiction of Colorado, and was doing business there under a contract with the State, which prevented the State from excluding it for twenty years, having paid a bonus or consideration of $15,000.00 for the privilege; nevertheless, the Legislature of Colorado would have had the power to impose upon it a tax for the privilege of doing business in the State double in amount that imposed upon domestic corporations, if the contract had not contained an express provision that foreign corporations admitted into the State should not have imposed upon them any tax greater in amount than that imposed upon domestic corporations.

This is precisely the question involved in this case. There is not a line or a word in the Alabama statute from which it can be inferred that foreign corporations admitted into the State shall not have imposed upon them a license or privilege tax different or greater in amount than that imposed upon domestic corporations.

Again, it is contended by plaintiffs in error that, having by consent of the State purchased the properties and franchises of domestic railroad corporations, they thereby acquired, by contract with the State, the right to operate the railroads and exercise the franchises so purchased; and therefore, in the operation of such railroads and the exercise of the franchises of the domestic corporations, they are exercising corporate powers and franchises granted by the State, and cannot have imposed on them for the exercise of these franchises any tax different in character or amount from that imposed on domestic corporations for the exercise of like corporate powers and franchises.

As we have heretofore attempted to show, the Legislature was utterly without power, by merely consenting to the sale by a domestic corporation of its properties and franchises to a foreign corporation, to thereby confer upon the foreign corporation authority to do business in the State. Such authority is acquired only by compliance with the requirements of the constitution and the statutes passed in pursuance thereof. But assuming that the Legislature had authority to grant such powers in such manner, the grant, in this instance, must arise by implication only, since there are no express words of grant of the power claimed. Yet it is a familiar and universal principle that a grant of powers or franchises by the State to a corporation can never be inferred, but must arise, if at all, from express language used. Everything that is not expressed is treated as withheld. To be in doubt as to whether the State has made such grant is to be resolved, and every resolution springing form doubt is in favor of the State and against the corporation. As shown by the allegations of the several complaints, the charters of plaintiffs in error gave them the power to acquire and operate railroads in Alabama, and it was from their charters alone, and not from the State of Alabama, that they acquired the *power* to operate such roads. From the State of Alabama they acquired the *consent* to operate the roads, *not the power*.

But even if, in the exercise of these franchises, they are exercising powers and franchises granted by the State of Alabama, it does not follow that for the use of these franchises they, as foreign corporations, can be taxed only in the manner that domestic railroad corporations are taxed for the use of like franchises. The only theory upon which such a proposition can be sustained, if it can be sustained at all, is that in so far as they are exercising these particular franchises they are domestic corporations. But this theory is untenable. To make an existing corporation created by one State a corporation of another State "the lan-

guage used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the Legislature, and such allegiance as a state corporation owes to its creator. *The mere grant of privileges or powers to it as an existing corporation, without more, does not do this and does not make it a citizen of the State conferring such powers.*"

Pennsylvania R. Co. v. St. Louis, etc. R. Co., 118 U. S. 296.
19 Cyc. 1205.

Moreover, there is no allegation in the complaints that the only railroads operated in Alabama are those purchased under the authority of the laws of Alabama. They may be, and it must be presumed that they are, operating other railroads. If so, then, being foreign corporations authorized to do business in Alabama, they are subject to this tax, if otherwise valid, and the amount of the tax must be measured by the actual capital employed in the State, notwithstanding a part of that capital is invested in roads purchased under authority of the laws of Alabama; just as, in the case of *Home Insurance Co. v. New York*, 134 U. S. 594, it was held, in construing the New York statute, that in estimating the amount of the tax it was proper to include that portion of the capital invested in United States bonds.

III.

THE TAX COMPAINED OF IS NOT AN INTERFERENCE WITH, OR BURDEN UPON, OR REGULATION OF INTERSTATE COMMERCE.

The third ground upon which the validity of the tax is assailed by some of the railroads is, that it places a burden upon, and is a regulation of, interstate busines of the railroads, and is, therefore, in violation of section 8 of Article I of the Constitution of the United States.

That the tax is not an interference with, or a burden upon, interstate commerce is, we think, shown not only by the provisions of the Act imposing the tax, but by many decisions of the Supreme Court of the United States. The Act contains the following provision:

> "6.—No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama *not constituting interstate commerce*, or maintain or demand any action in any of the courts of this State, *other than contracts based upon interstate commerce*, unless such corporation shall have paid such tax within sixty days after the same became due."

It clearly appears from this provision that the tax is not imposed, and the payment thereof is not required, as a *condition precedent*, which must be complied with before a foreign corporation can do any interstate business. The statute expressly recognizes its right to engage in such business, whether it pays the tax or not. And if a foreign corporation were engaged *solely* in interstate business, it would not be liable for the tax.

In view, therefore, of the manifest intention of the Legislature, as shown by the provision above quoted, not to impose any condition upon the right of a foreign corpora-

tion to engage in or do an interstate business in the State, the statute must be construed as taxing only the privilege of a foreign corporation to do an intra-state busines. So construed, the statute cannot be in violation of the commerce clause of the Constitution.

In *Osborne vs. State of Florida*, 164 U. S. 650, the Court, after stating that the construction of the Supreme Court of Florida, that a statute imposing a license tax upon express companies did not affect or apply to business of the companies which was interstate in its character, said, in a unanimous opinion:

> "It has never been held, however, that when the business of the company which is wholly within the State is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license of taxation does not refer to, or is not imposed upon, the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Mr. Justice Bradley, in the course of his opinion in *Crutcher vs. Kentucky*, 141 U. S. 47, that 'taxes or license fees in good faith imposed exclusively on express business, carried on wholly within the State, would be open to no such objection,' viz., an objection that the tax or license was a regulation of, or that it improperly affected, interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of *any* business in the State whatever, unless upon the payment of the fee or tax. * * * Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the

statute. *It can conduct its interstate business without paying the slightest heed to the Act*, because it does not apply to, or in any degree affect, the company in regard to that portion of its business which it has the right to conduct without regulation from the State. *The company in this case need take out no license and pay no tax for doing interstate business, and the statute is therefore valid.*"

And in *Cooke on the Commerce Clause of the Constitution*, page 149, it is said:

> "A tax imposed by way of restriction upon transactions not within the scope of the commerce clause, seems open to no objection merely because of the amount thereof being determined with reference to transportation that is within its scope."

To be a burden upon or regulation of, or interference with, interstate commerce, within the meaning of the commerce clause of the Constitution, the law complained of must *directly* affect such commerce. If such effect be a mere incident of the law, then the law is not a violation of said clause of the constitution. If the imposition or payment of this tax effect in any way the interstate business of any foreign corporation, it can only be because the diminution of its revenues by the amount of the tax renders it less able to carry on its business. But this is a mere incident such as results from the imposition of any burden or duty that involves an outlay of money, and it is not within the meaning of the commerce clause.

Nor does the method of ascertaining the tax, namely, by measuring the value of *all* the property in the State used in the transaction of their business, both that which is employed in interstate and that which is employed in intrastate business, constitute an interference with interstate commerce.

In *Home Insurance Co. vs. New York*, 134 U. S. 594, construing a statute similar to ours, the court said:

> "The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows."

This proposition was quoted with approval in *Maine vs. Grand Trunk R.*, 142 U. S. 217, and was made the basis for the decision that a franchise or privilege tax measured by the *gross receipts*, was not violative of the commerce clause.

In *California vs. Pacific R. Co.*, 127 U. S. 41, it was said:

> "The taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the Legislature may choose; it may be arbitrarily laid without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the Legislature; it cannot be furnished by the federal tribunals."

If the tax is in fact a franchise or privilege tax (and the Supreme Court of Alabama has so declared it in this case), imposed upon a foreign corporation for the privilege of exercising its corporate functions in the State, it is difficult to perceive any sound reason for declaring it invalid, simply because the amount is measured by some arbitrary standard, or by the amount of the capital, or value of the property, employed in the State, even though that prop-

erty be used in interstate as well as intra-state business. The precise question has been before the Supreme Court of the United States several times, and each time that court has held that such a tax, so measured, was not an interference with interstate commerce. As shown above, the State of New York imposes a franchise or privilege tax upon corporations similar to ours, the only difference being that the amount is measured by the amount of *capital stock* employed in the State. This is not a real difference, since the Court of Appeals of New York has declared that the capital stock is represented by the value of the property, and that it is proper to measure the amount of the tax by the value of the property.

In *Horn Silver Mining Co. vs. New York*, 143 U. S. 305, the validity of this tax was assailed on the ground that it was a tax on interstate commerce. In disposing of the question, the court said (page 318):

> "The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. *The objection that it operates as a direct interference with interstate commerce, we do not think tenable.* The tax is not levied upon articles imported, *nor is there any impediment* to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

This case was followed in *People ex rel. vs. Roberts*, 171 U. S. 657, which arose on a contest of the validity of the same statute.

A tax of the same character, imposed upon a *railroad corporation* doing an interstate and intra-state business, was upheld, against the same objection, in the case of *Maine vs. Grand Trunk Ry.*, 142 U. S. 217. The tax was called "an annual excise tax for the privilege of exercising

its franchise," and was imposed upon railroad corporations, the amount thereof being graduated according to the *gross receipts*. Necessarily, therefore, the receipts by which the tax was measured were receipts from interstate as well as from intra-state business. The court below held that the imposition of the tax was a regulation of interstate commerce. The Supreme Court reversed the judgment, saying (p. 228):

> "This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same, in determining the amount of the excise tax, was, in effect, the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax that should be levied; *and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce* which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended. * * * *There is no levy by the statute on the receipts themselves*, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

This case has never been overruled, but, on the contrary, has been cited with approval in the following subsequent cases:

Fickien vs. Shelby County, 145 U. S. 23;
Pittsburg, etc. R. R. vs. Backus, 154 U. S. 431;
Adams Express Co. vs. Ohio, 165 U. S. 220;
W. & M. R. R. vs. Powers, 191 U. S. 379.

IV.

THE TAX COMPLAINED OF IS A PRIVILEGE OR EXCISE TAX, AND NOT A PROPERTY TAX, OR TAX ON PROPERTY.

Some of the plaintiffs in error attack the tax on the ground that it is a property tax, and not a privilege tax, and that, being measured by the value of all their physical property in the State, it is equivalent to a direct *ad valorem* tax on the physical property, which they are required to pay in addition to the regular *ad valorem* tax levied directly on the same property. Hence, they say, they are required to pay a greater *ad valorem* tax than domestic corporations, which fact makes the tax discriminatory and unconstitutional.

This question was thoroughly considered by the Supreme Court of Alabama, which declared the tax to be a privilege tax, and not a property tax. The decision of the State court, defining the character of the tax, is, we think, binding on this court. In *New York Cent. & H. R. R. Co. v. Miller*, 202 U. S. 596, involving the New York tax of the same nature, this Court said: "We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us."

Taxes similar in all essential respects to the tax complained of have been declared to be privilege taxes in the following cases:

Home Ins. Co. v. New York, 134 U. S. 594;
Horn Silver Min. Co. v. New York, 143 U. S. 305;
Maine v. Grand Trunk R. Co., 142 U. S. 217;
Phoenix Carpet Co. v. State, 118 Ala. 151;
People v. Coleman, 126 N. Y. 433;
People, ex rel., etc. v. Wemple, 138 N. Y. 1.
People, ex rel. v. Knight, 173 N. Y. 255;
Gray on Lim. of Taxing Power, Sections 50 to 67.

ERROR IN DETERMINING THE AMOUNT OF THE TAX DOES NOT PRESENT A FEDERAL QUESTION.

The Supreme Court of Alabama also sustained the method adopted by the probate judges in determining the amount of the tax, that is, in determining that the "actual amount of capital employed in this State" was properly represented by the assessed value of the physical property of the corporation in the State used in the transaction of its business; and this decision of the State court is also binding on this court. In People ex rel. etc. v. Knight, 171 U. S. 661, involving the New York tax of the same nature, the Court said:

> "The construction put upon the statute of the state of New York by its courts is, of course, binding upon this court, and that portion of the contention which questioned the action of the comptroller on the ground of a misinterpretation of the law is thus disposed of."

And again, on page 663, it was said:

> "In the present case, indeed, complaint is made of the action of the comptroller in detremining 'the amount of the capital stock employed within the state' —that the amount fixed by him was too large. The action of the comptroller was subject to revisoin, and the corporation's complaints, in respect thereto, were heard and passed upon by the Supreme Court of New York. The estimate of the comptroller in determining the amount of capital employed in the state would not be judicially interfered with unless it was clearly

shown that the same was erroneous; *and, even then, such errors would not present a federal question for our consideration.*"

Respectfully submitted,

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Office Supreme Court, U. S.
FILED.
DEC 20 1909
JAMES H. McKENNEY,
Clerk

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1909.

No. 466.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN B. GASTON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

A. R. LAWTON,
T. M. CUNNINGHAM, JR.,
ROBT. E. STEINER,
HORACE STRINGFELLOW,
LEON WEIL,
Counsel.

BROWN PRINTING CO., MONTGOMERY, ALA.

IN THE
SUPREME COURT OF THE UNITED STATES.

CENTRAL OF GEORGIA RAILWAY COMPANY,
Plaintiff in Error,
vs.
JOHN B. GASTON,
Defendant in Error.

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error is a corporation organized under the laws of the State of Georgia, and authorized and empowered to do, and doing business for many years prior to January 1st, 1908, as common carrier by railroad in the State of Alabama, owning and operating six hundred miles of railroad therein, and engaged in both intra-state and inter-state business.

It had prior to said year duly qualified under the laws of Alabama and complied with the requirements of such laws by naming an agent in Alabama, filing a certified copy of its articles of incorporation, and paying the admission fee, receiving a receipt and acknowledgment therefor.

It had paid annually ad valorem taxes upon its property in the State of Alabama similar to those assessed against other persons and corporations having like property, for

the benefit of the State, counties and municipalities; and has paid the tax upon its intangible property assessed under an act entitled "An act to make subject to taxation and tax the franchises or intangible property and assets of any person, association or corporation engaged as a common carrier." Approved March 4th, 1907.

It had paid annually the license tax required by the 24th sub-division of Section 1122 of the Code of Alabama as amended by the Act of March 5th, 1901, entitled "An Act to further amend the revenue laws of Alabama;" such tax being required of all corporations doing business in the State whether organized in this State or another State or country, and not otherwise required to pay a license tax.

In addition to the above it had paid annually the tax assessed by the Auditor of the State for the support of the Railroad Commission of the State of Alabama, under section 3489 of the Code of 1896, and had received from the Auditor a license thereunder to operate its road from June 1st, 1907, to May 31st, 1908.

It had paid the license fee required by the Act entitled "An Act to further regulate the doing of business in the State of Alabama by foreign or non-resident corporations organized under and by authority of the laws of any other State or government other than the State of Alabama and to fix the penalty for the violation thereof. Approved March 7th, 1907, which was required to pay expense of keeping a registry of foreign corporations in the office of the Secretary of State.

In general it had complied with all laws of the State of Alabama affecting its right to do business in said State.

By an Act of the Legislature of Alabama entitled "An Act to provide for the revenue of the State by requiring all foreign corporations authorized to do business in this State under the laws of the State of Alabama, to pay an annual franchise tax" Approved March 7th, 1907, all foreign corporations authorized to do business in Alabama except strictly benevolent, educational or religious corporations, are required to pay annually to the Judge of Pro-

bate of the County in which it has a resident agent a franchise tax for the use of the State of Alabama upon the actual amount of capital employed by it in the State, in the amount of $25.00 on the first one hundred dollars, five per cent upon the next nine hundred and one-tenth of one per cent upon all remaining amount of capital so employed. Said Act further provides that the foreign corporation subject to the tax shall make a written statement to the Judge of Probate, giving among other things the actual amount of capital employed by it in the State. It further provides that the Judge of Probate shall have the power to summon before him any of the officers of the corporation or any other witness in order to satisfy himself as to the amount of the capital the corporation actually employed in the State of Alabama, and he is further authorized and it is made his duty to demand payment of the tax upon the amount of capital which he should find to be actually employed. The Act further provides for an appeal by either the State or the Company from his finding to the Circuit Court. It further provides that any corporation which pays the tax required therein should not be required to pay the tax required by subdivision 21 of Section 1122 of the Code as amended, which section imposed an annual franchise tax upon all corporations both foreign and domestic. It further provides for the payment for the benefit of the County one-half of the tax therein provided for the State. It further provides "No foreign corporation required to pay a tax under this Act shall do any business in the State of Alabama not constituting interstate commerce or maintain or demand any action in any of the courts of this State other than contracts based upon interstate commerce unless such corporation shall have paid such tax within sixty days after the same became due."

On the 17th day of January, 1908, the tax commissioner of Montgomery County demanded of plaintiff in error that it pay to the Probate Judge the tax provided by said Act.

On the 20th day of February, 1908, the plaintiff in error under protest made return under said Act to the Probate Judge of Montgomery County stating among the other things required by said Act, that its capital stock was $5,000,000, and that it had actually employed in the State the sum of $1,103,500. Said Probate Judge held and found that the amount of capital actually employed by plaintiff in error in the State of Alabama was the taxable value of its tangible property in said State amounting to the sum of $7,511,964.65, and demanded a tax based upon said value of its tangible property amounting to $7,580.96 for the use of the State of Alabama, and the further sum of $3,790.48 for the use of said County, amounting together to the sum of $11,371.44.

Under the fear of criminal prosecution and the fear of the results that would follow from failure to comply with the terms of said Act, the plaintiff in error on the 29th day of February, 1904, paid to John B. Gaston, the Probate Judge of Montgomery County, defendant in error, the said sum of $11,371.44 with notice to said defendant in error not to pay over said money to the State of Alabama, or to said County or to anyone except plaintiff in error and that suit would be brought to test the validity of said law under which said assessment was made and demanded and to recover said money as a whole and separately as to the amount paid for the use of said State and the amount paid for the use of said County.

On the 28th day of March, 1908, plaintiff in error instituted suit in the City Court of Montgomery against said John B. Gaston for the recovery of said money, setting forth variously in counts 7, 8, 9, and 10 of the complaint, the substance of the facts hereinabove set forth, and the further fact, that there were domestic corporations in the State of Alabama engaged in like business with plaintiff in error, that were not required to pay said tax, and that the value of its property was dependent largely if not entirely upon its right and authority to do an intra-state business in said State, and that if not permitted to do such business

it could not earn with its said property the cost and expense of operating the same.

It was claimed in and by said counts of said complaint that said Act under which said tax was assessed and demanded was invalid because of the various provisions of the constitution of the United States in that it violated the obligation of contracts between plaintiff in error and the State of Alabama; because it was a violation of the provisions of Section one of the Fourteenth Amendment of the Constitution of the United States in that it deprived plaintiff in error of its property without due process of law, and denied to it equal protection of the laws; and because said Act was in violation of Clause Three of Section Eight of Article One of the Constitution of the United States in that it operated as an interference with interstate commerce.

The defendant in error demurred to said complaint and to the several counts thereof upon the ground that said Act was not in violation of any provision of the Constitution of the United States, and particularly that said Act was not in violation of said provisions of said Constitution above stated.

The Judge of the City Court of Montgomery sustained said demurrers to each of said counts, and, the plaintiff in error declining to amend its complaint after said ruling on said demurrers, rendered judgment for the said defendant.

Thereupon the plaintiff in error appealed from said judgment of the City Court of Montgomery to the Supreme Court of Alabama, the court of last resort in said State, assigning as error upon said appeal the sustaining of said demurrers to said complaint and to the said several counts thereof, and the rendition of said judgment for defendant. Upon said appeal the following judgment was rendered by said Supreme Court "Come the parties by attorneys and the matters therein assigned for error being submitted on briefs and duly considered and understood by the Court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed."

ASSIGNMENT OF ERRORS.

1. Said Supreme Court of Alabama in affirming said judgment erroneously held and adjudged that said Act under which said tax was assessed and collected was not in violation of Section Ten, Article One of the Constitution of the United States in that it violated the obligations of certain contracts between the State of Alabama and plaintiff in error.

2. The Supreme Court of Alabama in and by affirming said judgment erroneously held and adjudged that said Act did not deprive plaintiff in error of its property without due process of law nor denied to it equal protection of the law in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Alabama in affirming said judgment erroneously held and adjudged that said Act was not violative of Clause Three of Section Eight of Article One of the Constitution of the United States as a regulation of interstate Commerce.

ARGUMENT.

Prior to the Act of March 7th, 1907, domestic and foreign railroad corporations paid the same annual franchise tax under sub-division 24 of Section 4122 of the Code of 1896 as amended; the maximum tax under said section being the sum of five hundred dollars however great the amount of capital stock. By the Act of March 7th, 1907, the tax upon foreign railroad corporations is separated from the tax upon domestic corporations of like character and vastly augmented; while the tax upon domestic railroad corporations continues to be governed by the sub-division of Section 4122, and remains the same. In consequence the plaintiff in error was required under said Act to pay a "franchise tax" amounting to the sum of $11,371.44, while domestic railroad corporations however great their capital employed in the State paid only the sum of $500.00.

Equal protection under the Fourteenth Amendment "is denied when upon one of two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other."

Cotting vs. Girard, 183 U. S. 79;
Cincinnati N. O. & T. P. R. R. vs. Kentucky, 115 U. S. 321;
Gulf, Col. & Santa Fe Ry. vs. Ellis, 165 U. S. 151.

If therefore the tax imposed upon plaintiff in error depends solely for its validity upon the general taxing power of the State to tax property or businesses within its jurisdiction, it is clearly invalid as a violation of the provisions of the Fourteenth Amendment.

Can the tax be justified as contended under the general power of the State in respect to foreign corporations?

A State may exclude foreign corporations from doing business therein and having the power to exclude it may impose such conditions as "a prerequisite to corporate life" that it may deem proper; provided they are not repugnant to the constitution and laws of the United States.

Paul vs. Virginia, 8 Wall. 168;
LaFayette Ins. Co. vs. French, 18 How. 404;
Security Mut. Ins. Co. vs. Prewitt, 202 U. S. 246.

Having complied with such conditions and obtained the franchise from the State, the corporation will not be granted relief therefrom in the Federal courts however oppressive they may be.

Home Silver Mining Co. vs. New York, 143 U. S. 305.

The principle upon which such relief is denied is that the corporation is held to voluntarily assent to the conditions by accepting the franchise. It is not permitted to enjoy the privilege and repudiate the accompanying conditions.

Ashley vs. Ryan, 153 U. S. 436;
B. & O. R. R. Co. vs. Maryland, 21 Wall. 453.

The power of the State to impose any conditions upon the admission of a foreign corporation to do business in the State however harsh or oppressive is based upon its right to refuse such admission, and from this right to refuse, is based a correlative power to revoke, *and upon this right to revoke* is based a further power "to change the conditions of admission at any time for the future and to impose as a condition the payment of a new tax, or further tax as a license fee."

Philadelphia Fire Ins. Co. vs. New York, 119 U. S. 110.

In the case of Philadelphia Fire Ins. Co. vs. New York, in stating the right of the State to impose new conditions upon the exercise of the franchise it is said: "If it imposes a new tax or further license as a pre-requisite for the future, the foreign corporation until it pays the license fee is not admitted within the State or within its jurisdiction. It is outside at the threshold seeking admission with the consent not yet given."

Manifestly this legal fiction should apply only when the corporation as to the new condition is the same as when it was admitted. Legal fictions "cannot be so stretched so as to presume the existence of the impossible," nor are they allowed to work injustice.

Jones vs. McPhillips, 82 Ala. 102;
Hibbard vs. Smith, 56 Amer. Rep. and Authorities cited;
Bouviers Law Dic. Title "Fiction", section 6.

The legal fiction stated in the case of Philadelphia Fire Ins. Co. vs. New York, supra, that the foreign corporation as to each new condition stands at the threshold of the State seeking admission, so far as it has been applied by this Court is in harmony with the limitations of legal fictions above stated, for it has been stated and applied only in the case of insurance corporations whose situation as to

each new condition or tax, is the same as when they were admitted. The question with such corporations upon being confronted by a new condition upon its doing business in the State is the same as when it first applied for admission, namely, whether the profits will justify the burden. There is no new hazard. The nature of the business of such corporations does not require the acquisition of property within the jurisdiction of the State, whose value will by reason of its nature be materially affected by refusal to comply. It is still optional with such corporation as to whether it will comply. Its compliance therefore is voluntary as in the first instance, and relief will upon such principle be denied.

But where the foreign corporation as here, is a common carrier by railroad, doing business in the State, its situation as to such new condition is essentially different from its situation in respect to the conditions imposed upon its admission. The nature of its business absolutely required it to acquire property within the jurisdiction of the State before it could enjoy the benefits of its franchise, property whose value is dependent upon the doing of the authorized business and is practically valueless without it. Under such circumstances the corporation must comply with the new condition, or the value of its property is destroyed. Its compliance therefore is no longer voluntary, but under duress. Can it be said that the relation of such foreign corporation to the State as to such new condition, is the same as when it applied for admission? Can it be said that the mutual rights and obligations of the State and the carrier, are the same in both instances, when voluntary consent the vital element in the former, is absolutely impossible in the latter; impossible, too, by reason of facts indispensable to the enjoyment of the franchise, and therefore within its contemplation ? We say within its contemplation for "the transaction must necessarily be held to have been entered into to produce its natural result."

Scott vs. Armstrong, 146 U. S. 499.

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To illustrate. The State can require a foreign corporation, a carrier by railroad as a condition to its admission, to charge only certain rates for the transportation of intra-state passengers or freight, although such rates are not compensatory. The corporation knowing the terms upon which its admission could be obtained would be free to accept or reject them, and accepting, it would properly be held to have voluntarily assented thereto.

Ashley vs. Ryan, 153 U. S. 436.

Suppose, however, after such corporation has complied with the conditions imposed upon its admission, and acquired a railroad and equipment within the jurisdiction of the State, the State should provide as a new condition to its doing business therein, that it should charge certain rates for the transportation of intra-state passengers or freight, one or both, which were not compensatory, or cease doing business therein. The carrier must submit to such rates or the value of its property dependent upon the particular use is destroyed. What answer could be given to the claim of the carrier that its property was being taken for public use without compensation? There is no distinction in point of fact between such case and where such rates are imposed as a regulation without such condition, the results are the same; and the power to impose such rates merely as a regulation has been denied by this Court, even as to foreign corporations.

Smith vs. Ames, 169 U. S. 466.

Can the penalty add to the power? If so, then a State may merely by making such regulation a condition to the doing of business therein, confiscate the property of all foreign corporation carriers by railroad to public use, without compensation, may by a mere phrase which in fact confers no option of free withdrawal evade the provisions of the Fourteenth Amendment.

The State has the power to repeal all laws authorizing the sale of intoxicating liquors within its jurisdiction and make such sale illegal. In the case of *Mugler vs. Kansas* 123 U. S. 623, it was contended that the prohibition law of that State in destroying the value of a brewery within the jurisdiction of the State, by forbidding its only use, was in effect the taking of property for public use without compensation, depriving the citizen of his property without due process of law. The Court held that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community;" and in distinguishing such case from the taking of property for public use without compensation said, "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated, in the other *unoffending* property is taken away from an *innocent* owner."

In the case of *Mugler vs. Kansas, supra*, as in the illustration above, where the regulation is made a condition of continuing business, the taking of property for public use was the consequence of the exercise of a recognized general power of the State. In the Mugler case, such consequence was justified upon the ground that all property was impliedly held subject thereto, and that the Fourteenth Amendment applied only to unoffending property of innocent owners. The property of the carrier under the facts of the above illustration is unoffending; its owner innocent of all offense against the laws of the State; and it cannot be said that its great investment was impliedly acquired or held subject to the caprice of the State. **Where then is the distinction in principle between the taking of property for public use by imposing confiscatory rates as a regulation, which is condemned, and the taking of such property for such use by imposing such rates as a condition of the carrier continuing in business?**

That the power of the State to impose new conditions upon the continuance by foreign corporations therein is not without its limitations under the Constitution of the United States is manifest from the case of Bedford vs. Eastern Building & Loan Assn., 181 U. S. 227, where it is said: "We recognize the power of the State to impose conditions upon foreign corporations doing business in the State. We have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge citizens of the State from their contract obligations." In that case the value of the intangible property of the foreign corporation was destroyed by the denial of the remedy; here the value of its tangible property would be destroyed by the denial of its use. The only difference is in the means of destruction.

If a State cannot under its power over the admission of foreign corporations, impose oppressive rates on intrastate transportation as a condition of continuing business therein, then it cannot under such power impose a discriminative tax upon such carrier as a condition of the continuance of its business, for both are but different forms of expression of a single power. If the power does not exist as to one, it can not exist as to the other.

That a State cannot discriminate against the property of a foreign corporation *within its jurisdiction* is clearly implied in the case of *Blake vs. McClung*, 172 U. S. 239.

Even where the power to revoke, alter or amend is expressly reserved by constitutional provisions or in the charter, it is held that such power is not without its limitations; that "beyond the sphere of reserved powers, the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolate as in other cases."

Stanislaus vs. San Joaquim, etc., 192 U. S. 201;
Berea College vs. Ky., 211 U. S. 45;
Hammond Packing Co. vs. Kansas, 212 U. S. 345.

Certainly the power to revoke the permission of a foreign corporation to do business in the State and to impose conditions upon the continuance of such business, the mere legal consequence of the power to refuse admission cannot be of higher dignity, nor more independent of the protecting provisions of the Fourteenth Amendment, than where such power is *expressly* reserved in Constitution or charter and thus *assented* to.

But further. A State except as to the acts of its agents and officers, may be estopped by its conduct like individuals, even as the same rules of contract that apply to the one apply to the other.

Thus in the case of *Turner vs. City of Mobile*, 135 Ala. 73, it was claimed that the City and State were estopped by the fact that they had levied taxes upon complainants' wharves, from asserting a title to the shore upon which such wharves were situated. The estoppel was denied, not because it could not apply to a State, but because it was held there "was no inconsistency between governmental action of this sort and the assertion by the government of the right to re-occupy the lot if it is otherwise entitled to do so."

Magee vs. Hallett, 22 Ala. 699.

Again in the case of *Hackett vs. Ottawa*, 99 U. S. 86, it is said: "A municipal corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced.'

Again in the case of *City Street Ry. vs. Citizens Street Ry. Co.*, 166 U. S. 557, the extension of a franchise by the city for seven years was attacked for want of consideration. The court said, "All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action upon the part of the city which it had the power to take the Company incurred a new liability."

Again in the case of *Curran vs. State of Arkansas*, 15 Howard 304, while the right of the State to withdraw certain funds it had deposited in a bank in which it was sole stockholder for the purpose of meeting certain liabilities that might be thereafter incurred was denied upon the ground that "a contract between the State and the creditor not to withdraw that fund to its injury, at once arose," the contract was created upon the principles of estoppel, upon the injury that would follow to the creditor from its withdrawal.

In such cases the inability of the Sovereign or its instruments to revoke, does not rest upon "the voluntary surrender of a right" as by contract, but upon "the inhibition to assert it, from the mischief that it has caused" or will cause.

It is clear that individuals are estopped by the inhibition above stated, from revoking a parol license, even as to land, and although without consideration, when the value of the property of the licensee depends upon its continuance.

In the case of *National Water Works Co, vs. Kansas City*, 65 Fed. 691 (Circuit Court of Mo.), the Water Company with the oral permission of the Superintendent of a railroad company constructed its pipe line upon the property of such Company, thereby establishing connection with the supply station and the City of Kansas City, Mo. The Court said, "The rule is recognized in this State and elsewhere, that where one party enters upon the real estate of another under parol license from the latter and at large expense constructs improvements which is necessary for the successful carrying on of the business of the licensee, the licensor is estopped to deny the right of the licensee to continue such occupancy and use so long as the necessities of the business may require" citing *House vs. Montgomery*, 19 Mo. App. 170; *LeFevre vs. LeFevre*, 4 Serg. & Rawle 241; *Rerick vs. Kern*, 14 Id. 267; *Campbell vs. Railroad Co.*, 110 Ind. 490; *Wilson vs. Chalfant*, 15 Ohio 248; *Clark vs. Glidden*, 60 Vt. 702; *Brewing Co. vs. Morton*, 47 N. J. Eq. 156; *Dule of Devonshire vs. Eglin*, 14 Beav. 530.

The same doctrine of estoppel has been applied by the Supreme Court of Alabama in the case of *Bailey vs. Southern Ry.*, 118 Ala. 560, and other cases; and by this Court in the case of *Northern Pac. Ry. vs. Smith*, 171 U. S. 269, and other cases, to prevent an owner of land from terminating the possession by a railroad of its right of way, where the railroad has expended large sums of money for its improvements with the knowledge of the owner.

In the case of Swain vs. Seamans, 9 Wall. 251, it is said, "Where a person tacitly encourages an act to be done, he cannot afterward exercise his legal right in opposition to such consent, if his conduct or acts of encouragement, induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

The compliance by plaintiff in error, a foreign corporation, with the conditions imposed upon its admission, constituted the terms upon which the permission or consent of the State to its doing business therein could be obtained. When such terms were complied with, the consent of the State to the doing of its business therein was necessarily given; and when vast sums were expended by the corporation in the acquisition of property in the State necessary to the enjoyment of such permission, the value of which is dependent upon the use the State under the authorities supra, is inhibited from arbitrarily revoking such permission, by the mischief that would follow from the refusal of the right to continue in such business.

Chicago Ry. Co. vs. Swanger, 157 Fed. 791;
Seaboard Air Line Ry. vs. R. R. Commission, 155 Fed. 803.
See *B. & O. R. R. vs. Koritz*, 104 U. S. 5.

In the case of *Ames vs. Union Pac. Ry. Co.*, 64 Fed. 177, "Brewer Circuit Judge," it is aptly said: "It must always be born in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn

at the pleasure of the investors. Railroads are not like stages or steamboats which if furnishing no profit at one place and under one prescribed rate of transportation can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and as a permanent investment its value to its owners may not be destroyed. The protection of property implies protection of its value."

The inability of the State under the principles of estoppel above stated to arbitrarily revoke the permission of plaintiff in error to continue its business as common carrier of intra-state transportation therein, is as has been stated independent of its intention to part with such absolute power, and therefore independent of contract; but if such contract is technically necessary, it should be raised from the permission to plaintiff in error to engage in such business upon compliance with the terms of admission; the compliance with such terms; the necessity for plaintiff in error to acquire railroads in said State in order to avail itself of such permission; the absolute dependence of the value of such property upon the continuance of such business, and the consequent impossibility of a supposition that such value should depend upon the right of the State to arbitrarily revoke.

Curran vs. State of Arkansas, 15 How. 304 supra.

If the State could not under its power over foreign corporations arbitrarily revoke the permission of plaintiff in error to engage in the business of common carrier by railroad therein, then it cannot under such power impose new arbitrary conditions upon the continuance of such business, for as has been stated by this Court its power to impose such conditions, in any case, is based upon its power to revoke.

But it is contended that the State may arbitrarily revoke the power of plaintiff in error to do business in the State under the provisions of the State Constitution, pro-

viding for the revocation, amendment or alteration of grants, privileges and franchises; and having the power to revoke it can impose any condition upon the continuance of such business it may deem proper.

Such provisions occurring in the Constitutions of many of the States, and in charters, are subordinate to the Constitution of the United States, and have never been considered by this Court as permitting the exercise of the power to revoke or amend to the arbitrary destruction or impairment of property rights. On the contrary such exercise of such power has been consistently denied.

Thus in the case of *Stanislaus vs. San Joaquin & R. R. C. & I. Co.*, 192 U. S. 201, after discussing many of the decisions of this Court upon the effect of such provisions the Court said: "These cases also hold that there is a limitation even to the power of amendment, when reserved in the Constitution or statute of a State. Some of the cases although holding that the power to amend or repeal was properly exercised in them also state that the power is not without limit; that the alteration must be reasonably made in good faith and consistent with the scope and object of the Act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolate as in other cases. In reiterating this view of the power, we think that a mere reduction of rates while still leaving reasonable, fair or just compensation for the use of property is not prohibited."

Again in the case of *Hammond Packing Co. vs. Kansas*, 212 U. S. 345, the contention was for exemption by contract from the operation of "a lawfully regulating statute." The Court in giving effect to a provision of the constitution of the State providing for the repeal, alteration or amendment of charters in such manner, however, that no injustice be done to the corporation said, "The determination whether the power to repeal, alter or amend was

exerted in such manner as to be unjust to the corporation was within the province of the State Court to finally decide *unless* that power was exerted in such an arbitrary manner as irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the constitution of the United States." (Italics ours.)

Union Pac. Ry. Co. vs. U. S., 99 U. S. 700.

We submit, therefore, under the above authorities that the State of Alabama has no power either under its power over the admission of foreign corporations to do business therein, or under the reservations of the right to revoke and amend, reserved in its Constitution, to impose a discriminative condition upon the continuance by plaintiff in error of its business as common carrier by railroad therein. This being true the Act of March 7th, 1907, in imposing such discriminative condition deprives plaintiff in error of its property without due process of law and denies to it equal protection of the law.

THE ACT OF MARCH 7TH IMPAIRS THE OBLIGATION OF A CONTRACT BETWEEN THE STATE AND PLAINTIFF IN ERROR.

"That the same rules of contract are applicable where the sovereign is a party as between individuals is admitted."

Hunter vs. U. S., 5 Peters 185;
Huidekofer Lessee vs. Douglas, 3 Cranch 70.

While the permission to plaintiff in error to engage in business in the State was by general law, such permission must have the same effect as a contract as if no other foreign corporation had been included therein.

Stanislaus vs. San Joaquin & R.y Co., 192 U. S. 201.

The laws of the State of Alabama provided for the admission of plaintiff in error to do business therein upon the following terms; its naming an agent residing in the State of Alabama; filing a certified copy of the articles of its incorporation, and the payment of an admission fee (Record, page 19). This fee was "obviously a payment for the franchise." *N. Y. & Brooklyn City R. R. Co. vs. State*, 199 U. S. 1.

Plaintiff in error accepted such offer and complied with such terms in every respect.

Here we have all of the elements of a contract between the State of Alabama and plaintiff in error, an offer for a valuable consideration, an acceptance and payment of such consideration, by which contract plaintiff in error obtained the right to enter and do business therein.

American Smelting Co. vs. Col., 204 U. S. 103.

While the express terms of this admission of plaintiff in error to engage in the business of common carrier by railroad in the State were as above stated, such terms did not constitute all of the contract. There were other obligations assumed by plaintiff in error which although implied were as much a part of such contract as if expressly stated therein.

Scott vs. Armstrong, 146 U. S. 499;
Utley vs. Donaldson, 94 U. S. 46.

There was implied an obligation upon the part of plaintiff in error to observe such reasonable regulations in the management of its business and property as the State might deem proper to adopt, for the public welfare.

Hammond Packing Co. vs. Arkansas, 212 U. S. 531.

There was further implied as part of such admission that the franchise was "subject to the same right of taxation by the State that applies to all other privileges and

to all other property;" that plaintiff in error would contribute its ratable share towards the support of government.

Memphis Gas Light Co. vs. Taxing District, 109 U. S. 398;
N. Y. ex. rel. M. S. R. Co. vs. State Board, etc., 199 U. S. 1.

In the case of *New York L. E. & W. R. R. Co. vs. Pa.*, 153 U. S. 629, where it was held that there was a contract between the foreign corporation and the State, it was said that the State could not in consequence impose any other conditions "except such as the State in the exercise of its police power, for the purposes of taxation and for other public objects may legally impose in respect to business carried on and property situate within its limits." This obligation was implied.

Such being the obligation of plaintiff in error in reference to taxation, and regulation, implied as part of the contract of admission, can such obligations be increased so as to make the property and its privilege subject to discriminative taxation and unreasonable regulations? Do not the obligations of one party to the contract necessarily measure the rights of the other?

Every obligation whether created by law, or by the express terms of a contract, is negative as well as affirmative in its operation. It is affirmative, in imposing a liability; and negative, in restricting the liability, to the terms stated. If a special obligation is nevertheless general, what purpose can there be, in defining its terms, either by law, or by the parties?

If the State in stating the terms of admission or by separate statute had stipulated that plaintiff in error should hold its franchise "subject to the same right of taxation by the State that applied to all other privileges and all other property" therein, such stipulation in connection with the other terms of admission above stated, would be

held to constitute an affirmative contract upon the part of the State that the privilege and property of plaintiff in error should be subjected only to the same right of taxation that applied to all other privileges and all other property therein.

American Smelting Co. vs. Col., 204 U. S. 103.

Can there be any difference in the legal effect of such stipulation, that it is inserted in the terms of the contract of admission by *general law*, instead of by *general statute?* The common law is part of a contract as well as the statutory.

United States vs. Price, Ex., 9 How. 91.

The force of this implied stipulation that the property and franchise of the corporation should be subject to the same right of taxation as applied to all other privileges and all other property in the State, is shown in the case of Memphis Gas Light Co. vs. Taxing District, 109 U. S. 628, where it was held, that if the corporation "wished or intended to have an exemption therefrom, or felt that it was necessary to the profitable working of its business it should have required a provision to that effect in its charter." So also it should be true, that if the State wished or intended to have the arbitrary right of taxation, it should have so stipulated in the terms of admission, for if instead of said obligations for equality and reasonableness of burden above stated, there is implied the right of the State to arbitrarily revoke, or arbitrarily impose new conditions, to the destruction of the value of the property of plaintiff in error contemplated to be acquired by it under said contract, such intendment would operate as a snare, and every intendment is to be made against such construction.

Utley vs. Donaldson, 94 U. S. 29.

There is nothing in the Constitution, nor in the laws of the State, suggesting the reservation of such power; nothing to inform plaintiff in error that such a limitless obligation, was one of the terms of its admission to do business therein; and in view of the consistent provisions of the Constitution of the State against oppression, and for equality in taxation, it may certainly be said that plaintiff in error may at least have understood the obligation differently. The State is now insisting upon such arbitrary and destructive right, occupies a position similar to that defined by Chief Justice Marshal in the case of *Huidekofer Lessee vs. Douglass*, 3 Cranch 70, as follows: "The State is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property. If he should couch his proposition in such terms that they might be understood differently in consequence of which sales were to be made and purchase money paid, he would come with an ill grace into court to insist on a latent and obscure meaning which should give him back his property and permit him to retain the purchase money. All those principles of equity and fair dealing which constitute the basis of judicial proceeding require that the Court should lean against such construction."

The contract insisted on here is merely for uniformity; for equality of burden. Such contracts are differently construed from contracts for exemption from taxation. Contracts for exemption are strictly construed and only exist by express terms or clear implication. On the other hand an interpretation securing uniformity of taxation is favored and indulged in by the courts. Savings Bank vs. Archibold, 104 U. S. 708.

Nor can it be said that the contract between the State and the plaintiff in error was subject without limitation to the constitutional reservations of the right to repeal, alter and amend.

Stanislaus vs. San Joaquim, etc. R. R., 192 U. S. 201.
Berea College vs. Ky., 211 U. S. 45.

In speaking of constitutional reservations of the power to repeal and amend, this court in the case of *Berea College vs. Ky.*, 211 U. S. supra, said: "It is undoubtedly true that the reserved power to alter or amend is subject to some limitations, and that under the guise of amendment a new contract may not always be enforceable upon the corporation or its shareholders, but it is well settled that a power reserved to the Legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or essentially impair the object of the grant or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right."

It would essentially impair the object of the grant to plaintiff in error, and its property rights vested thereunder to substitute for the implied condition that its franchise and property were subject to the same right of taxation by the State that applied to all other privileges and property therein, the condition that its franchise and property should be subject to discriminative taxation, which where the power exists, may be exercised without limit.

On the other hand contracts with such foreign corporations as insurance companies, where the value of property within the jurisdiction of the State, is not dependent upon the continuance of such franchise, and therefore will not be destroyed by repeal, are within the reserved powers of repeal and amendment above stated.

In the case of *Hammond Packing Co. vs. Arkansas*, 212 U. S. 322, where the power to alter or repeal under constitutional provisions was sustained and applied, the alteration was a "lawfully regulating statute," for the abatement of trusts and was so termed by the Court. It

applied to all corporations. It was to secure a public right and was clearly within the reserved power above stated.

If it be that there was a contract between the State and the plaintiff in error with the implied obligations above insisted upon, then the Act of March 7th, 1907, imposing the discriminative tax upon it was a clear impairment of the obligation of said contract.

INTERSTATE COMMERCE.

Under the constitution of the State of Alabama common carriers by railroad cannot withdraw from intra-state business.

Section 242 of the Constitution of 1901 provides: "All railroads and canals, not constructed and used exclusively for private purposes, shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railway between any points in this State and connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect connect with or cross any other railroad and each shall receive and transport freight, passengers, and cars loaded or empty of the others without delay or discrimination."

That the Constitution of Alabama imposes the duty of intra-state business upon all railroads in the State is not denied by the Supreme Court of Alabama in its decision and opinion herein; on the contrary the existence of such duty is therein admitted; the portion of the opinion relating to said section of the Constitution being as follows:

> "The fact that section 242 of the constitution places certain duties on railroad corporations has no bearing on this question, for if the State itself prohib-

its the corporation from doing intra-state business it could not be subjected to liability for not doing it."

If the constitution imposes upon railroads doing business therein the duty of intra-state tran-portation, then there is the correlative constitutional right of the people of the State to have such duty performed. Can the Legislature relieve the carrier from this constitutional duty, and destroy the constitutional right by making the act unlawful? Would the Supreme Court of Alabama hold to the same opinion in a proceeding to compel the performance of such duty, or for compensation for failure to perform?

If plaintiff in error is not free to withdraw from the transportation of intra-state passengers and freight without withdrawing from inter-state business also, then the Act of March 7th, 1907, interferes with the regulation of interstate commerce by Congress.

Pullman Co. vs. Adams, 189 U. S. 420.

In the case of Pullman Co. vs. Adams, supra, it is said: "If the clause of the State constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid." Again, "As the validity of the tax is thus bound up with the effect of the section of the State Con-titution, we think the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it *could not be justified by reasoning which leaves that point obscure*. We are somewhat embarrassed in dealing with this case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the constitution of the State of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both the clause in the constitution or the tax act is invalid. But we assume that the opinion of the

Supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reasons sufficiently stated above." (Italics ours.)

In the case of *Pullman vs. Adams*, the Supreme Court of Mississippi had held that the Constitution of that State imposed no obligation upon the Company to accept intra-state passengers upon its cars merely passing through the State. This construction was concurred in by this Court, and upon this ground and the further ground, that it construed the language of the Supreme Court of Mississippi "as meaning that no such interpretation would be attempted in the future," this Court held that the tax did not constitute a regulation of inter-state commerce.

Here, however, the Supreme Court of Alabama tacitly, if not expressly admits that the Constitution of the State does impose upon the carrier the duty of an intra-state business; its conclusion being that the prohibition of the statute would relieve plaintiff in error of such liability. The Court cites no authority for such conclusion, and it is difficult to discover any sound reason therefor unless such reason could be found in the constitution itself. The *suspension* of the constitutional duty resting upon plaintiff in error to engage in intra-state business would therefore depend "in the future," upon the Supreme Court of Alabama adhering to its ruling as to the effect of the statutory prohibition, in any proceeding to enforce the performance of such duty, or for compensation for failure to perform. It is reasonable to suppose that in such direct proceeding, the consequences of denying intra-state transportation to citizens of Alabama, whose property

values are dependent thereon, would induce a closer investigation by the court as to the exculpating effect of the legislative prohibition; and that unless authority could be found upon which to base such ruling, its decision would be reversed.

There is another reason why a discriminative tax upon the continuance by a foreign corporation of its intra-state business, as a common carrier by railroads, affects inter-state commerce; although it would seem that under the decisions of this Court such effect if under a lawful power would not be violative of the Federal Constitution.

If the power to impose such discriminative condition exists it may be exercised under the authorities above cited without limit. It may be exercised even to a point where the carrier cannot engage in such business except at a loss. As the burdens are imposed upon intra-state business, the burden of inter-state business must be increased; if it be possible to operate for such business alone, a fact that is denied in the complaint here (record, page 12). It would seem, however, if such discrimination is lawful that such effect upon inter-state commerce, however burdensome, or disastrous, would not be violative of the inter-state commerce provision of the Federal Constitution.

Ashley vs. Ryan, 153 U. S. 436.

In the case cited such increased burden upon inter-state commerce was occasioned by a reservation by the State of a portion of the receipts of the carrier from intra-state commerce, imposed as a condition of *admission*. The carrier was held by acceptance to have assented thereto and it was held that the burden being in consequence of the exercise of a lawful power its validity was not affected by its effect to increase the burden upon inter-state commerce; and would not have been affected if the State instead of reserving only a portion had reserved all of either freight or passenger receipts.

We take it, therefore, under the decision above cited, that if the discrimination against plaintiff in error be in the exercise of a lawful power, it can obtain no relief upon the ground of increase of burden upon inter-state commerce, although the effect of the penalty for failure to comply with such discrimination would be to deprive it of the ability to engage in an inter-state commerce business at all, as averred in the complaint.

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